TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 320

PROCK STONE, PETITIONER

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1952

CERTIORARI GRANTED OCTOBER 27, 1952

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 25, 1952.

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[fols. 1-3] STATE OF MISSOURI,

City of St. Louis, ss.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

Number 40009, Division Number 5

PROCK STONE, Plaintiff,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Defendant

Defendant's Transcript of the Record on Appeal

[fol. 4] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

PETITION—Filed August 22, 1950

1. Comes now the plaintiff and states that the defendant is a corporation duly organized and existing pursuant to the laws of the State of Missouri and doing business in the City of St. Louis, State of Missouri; that the defendant, as a railroad company, is engaged as a common carrier in interstate transportation.

2. Plaintiff was employed by the defendant as a track laborer, engaged in the maintenance and repair of its main and side tracks over which passengers and freight which were enroute to and from various states were transported; that at all times hereinafter mentioned, both the plaintiff and the defendant were engaged in interstate commerce and the work being performed by plaintiff at the time he was injured substantially affected and was in the furtherance of interstate commerce.

[fol. 5] 3. This action is brought pursuant to the Federal Employers' Liability Act, 45 USCA, Section 51-59 (35 Stat. 65).

4. Plaintiff states that on or about May 2, 1949, he was employed by the defendant as a track laborer at Argos,

Indiana; that while so employed and in the furtherance of interstate commerce, he was working on defendant's track at a place called the "Y" track, near the depot at Argos, Indiana; that plaintiff was assigned to the task of assisting in the removal of old and worn track ties and was furnished a pair of tongs with which to perform said work; that plaintiff endeavored to remove a tie from under the track rails by the use of the tongs furnished in the usual, ordinary and customary manner, but that said tie would not come loose; thereafter, at the direction of the assistant foreman, plaintiff was ordered to use all of his force to jerk said tie and was taunted and accused by said assistant foreman of not trying.

5. Plaintiff further states that at the order of the assistant foreman, he exerted his utmost strength and pulled and jerked on the tongs, but that said tie would not come loose, but that he was injured as a direct and proximate cause of said jerking, pulling and straining.

6. Plaintiff further states that he was unable, with the assistance of a co-laborer, to dislodge said tie by pulling and [fol. 6] it was necessary to jack up the track so that the tie could be raised upward before it could be removed, due to the presence of a track spike which extended through said tie and which was embedded in the ground and that said spike prevented the removal of said tie by the pulling method as ordered by the agent and servant of the defendant.

7. Plaintiff states that he was injured as a direct and proximate result of the negligence and carelessness of the defendant in the following respects:

a) In that defendant peremptorily ordered and directed the plaintiff so to perform his work that in obedience thereto and as a direct and proximate result thereof, plaintiff was caused to abnormally exert himself so that his injuries were brought about.

b) In that the defendant failed to inspect and by inspection to discover that the spike protruding downward from said tie constituted such an obstruction that the tie could not be pulled from under the track by the combined efforts of the plaintiff and a co-employee.

c) In that the defendant failed to warn or appraise the

plaintiff of the danger to which it was then and there subjecting the plaintiff.

[fol. 7] d) In that the defendant failed to jack up the railes to enable said tie to be pulled out until after the plaintiff had been injured.

e) In that the defendant failed to provide sufficient help under the circumstances then and there existing to remove said tie.

f) By reason of the allegations contained in subparagraphs (a), (b), (c), (d) and (e) above, the defendant failed to exercise ordinary care to provide the plaintiff with a reasonably safe place in which to perform his work.

g) In that the defendant's foreman refused and neglected to grant permission to the plaintiff to go to the railroad company's physician for examination or treatment until thirty (30) days' time had elapsed since his injury thereby aggravating plaintiff's injuries and inflicting upon him additional pain and suffering by ordering him to report for work and to perform tasks which he was physically unfit to perform.

8. Plaintiff states that as a direct and proximate result of the negligence and carelessness of the defendant, its agents and servants, plaintiff was injured and sustained the following injuries:

Injury to the spine; injury to the 3rd, 4th and 5th intervertebral discs, requiring the removal of the 5th interverte-
[fol. 8] bral cartilage; that plaintiff sustained a right foot drop; a severe shock to his nerves and his entire nervous system.

9. Plaintiff states that all of said injuries are painful, serious and permanent; that the motion of plaintiff's back, right leg and hip is seriously impaired; that the plaintiff had to undergo surgery for the removal of the herniated discs; that as a result of the injury to the intervertebral discs, plaintiff sustained injury to the nerve roots, walks with a limp and has pains in his lower back and right leg; that plaintiff has developed a drop foot as a direct result thereof; that there is no activity in the anterior tibial muscle or extensors of the toes, the posterior tibial muscle is weak, and because of the muscle involvement active dorsiflexion of the

foot is impossible, resulting in toe drop position of the foot; there is slight dimunition of tactile sensation on the lateral aspect of this leg and dorsum of the foot; that there is marked narrowing of the interspaces between the third and fourth and the fourth and fifth lumbar without evidence of new bone formation; that plaintiff must wear a double spring pick up brace; that there is atrophy of the right thigh and leg, that the leg flexion on the right leg is limited and there is marked weakness in the right leg.

10. Plaintiff states that he will require medical care, [fol. 9] surgery and hospitalization in the future; that he will be permanently disabled as a result of the aforesaid injuries and will be permanently disabled in the future from engaging in his previous occupation, or from engaging in any other form of labor upon which he is dependent for a livelihood.

11. Plaintiff states that he has become obligated for and expended the sum of Five Hundred ($500.00) Dollars for medical care and hospitalization; that he will be required to obligate himself for additional sums for medical care, surgery, hospitalization and orthepedic treatment and appliances in the future; that plaintiff has been unable to work and has lost earnings in the amount of approximately Three Thousand, Ten ($3,010.00) Dollars and that he will continue to lose earnings in the future.

12. Plaintiff states that as a direct and proximate result of the negligence and carelessness of the defendant, he has been damaged in the sum of Seventy-Five Thousand ($75,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the defendant in the sum of Seventy-Five Thousand ($75,000.00) Dollars together with his costs in this behalf expended.

[fol. 10] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

AMENDED ANSWER

1. Defendant admits the allegations of paragraphs 1, 2 and 3 of the petition, except the allegation that the defendant is a Missouri corporation.

2. Defendant admits the allegation of paragraph 4 that

plaintiff was employed by defendant as a track layer, at Argos, Indiana, on May 2, 1949, but denies the balance of the allegations of paragraph 4 and of all the other allegations of the petition.

Further answering, defendant states that if the plaintiff was injured in the manner set forth in the petition, that his injuries were caused in whole or in part by his own negligence in exerting his utmost strength to pull and jerk on the tongs when he knew, or in the exercise of ordinary care for his own safety should have known, that to do so would cause a strain to his back and the injuries of which he complains.

Wherefore, having fully answered, defendant prays to be dismissed with its costs.

Copy of the foregoing amended answered delivered this 30th day of March, 1951, to Tyree C. Derrick, 418 Olive, St. Louis, Mo., Attorney for Plaintiff.

[fol. 11] In the Circuit Court of the City of St. Louis

Statement of Evidence

Appearances

Tyree C. Derrick, Appeared for the Plaintiff.

Messrs. Jones, Hocker, Gladney and Grand, by Mr. Lon Hocker, Appeared for the Defendant.

The jury was duly impaneled and sworn to try the cause.

Plaintiff's Evidence in Chief

The plaintiff then to sustain the issues on his part introduced the following evidence:

Prock Stone, the plaintiff in said cause being produced as a witness on his own behalf being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Derrick:

Q. Will you state your name please?
A. Prock Stone.

Q. Where do you live, Mr. Stone?
A. Argos, Indiana.
Q. Mr. Stone, raise your voice if you can so that those [fol. 12] gentlemen over here, the farthest jurors can hear you. How old are you, Mr. Stone?
A. Forty-eight, will be my birthday.
Q. Are you married?
A. Yes sir.
Q. Have a family?
A. Yes sir.
Q. A wife?
A. Yes sir.
Q. How many children?
A. Four.
Q. Will you start at the bottom and give me their names and ages?

Mr. Hocker: I think that is irrelevant, if Your Honor please.

Mr. Derrick: I think that is very relevant, if the Court please, to ask about his family, his minor children.

The Court: Well of course he has already stated he has a family. Isn't that sufficient, it wouldn't be an element of damage anyhow?

Mr. Derrick: It would be a circumstance about his work and his ability to work.

Mr. Hocker: I don't think so.

[fol. 13] By Mr. Derrick:

Q. All right, Mr. Stone, what education have you had?
A. Well up to the fourth.

The Court: I didn't hear you.

Q. Did you complete the fourth grade, a little louder?
A. Up to the fourth grade.
Q. Did you complete the fourth grade?
A. No, I didn't.
Q. What sort of work have you done during your life?
A. Labor.
Q. Labor work?
A. Yes, common labor.
Q. You are going to have to speak louder?

A. OK.

Q. Now you say you live in Argos, Indiana?

A. Yes sir.

Q. Where do you live in the town or the outskirts of the town?

A. It is just in the outskirts of the town.

Q. Do you have a farm or place, describe where you live?

Mr. Hocker: That is irrelevant if Your Honor please.

Mr. Derrick: I don't think it is, Your Honor, because there is going to be — question about his work and what he does.

The Court: What is the question, I didn't get it?

[fol. 14] Mr. Hocker: Describe the place where you live is the question, Your Honor.

The Court: I will sustain the objection.

By Mr. Derrick:

Q. Do you do any work around your place?

A. Nothing only just tend to the chickens and things like that.

Q. Were you employed at any time by the Nickel Plate Railroad Company, the New York, Chicago and St. Louis, Railway Company?

A. Yes sir.

Q. About when did you go to work for them?

A. About November 7th, 1948.

Q. What were your duties, what kind of work did you do?

A. I worked on the extra gang and from the extra gang to the section crew.

Q. Describe the extra gang, what kind of work did they do, the section gang, what did they do?

A. The extra gang they laid steel, put in the steel, and ties, and mostly they have a big crew and they have got to put in quite a lot of steel.

Q. How long were you with the extra gang?

A. Well about, oh, I couldn't tell you just exactly, but four or five months, something like that.

Q. Then were you transferred or how did you get on the [fol. 15] section gang?

A. They laid off on the extra gang and I bumped in on the section gang.

Q. Explain what you mean by bumping in?

A. Well the oldest man can bump a new man off you know, and get in, so I had to.

Q. So if you have seniority over some other man, you can take his job if you get laid off, is that right?

A. Yes, if you get laid off and you have seniority over the other place.

Q. Now who was your boss on the section gang?

A. Eugene Slagle.

Q. Who was that?

A. Eugene Slagle.

Q. Did you have any other boss?

A. Dick Stoughton was the straw boss.

Q. How do you know he is a straw boss?

A. Well he was left in charge of work when Slagle wasn't around.

Mr. Houcker: That is asking for a conclusion of the witness, Your Honor, I object to it, and ask that it be stricken.

The Court: I will overrule the objection.

By Mr. Derrick:

Q. Were you ever told by anybody that he was to be in [fol. 16] cl rge?

A. Yes sir.

Q. Tell what you were told about that, who told you?

Mr. Hocker: Just one question at a time, I have no objection to your asking who told him at this time if that is the question.

Mr. Derrick: Go ahead and answer.

Mr. Hocker: There were two questions asked, Your Honor. I don't object to the question who told him preliminarily. I am objecting to the question in its present form.

Mr. Derrick: Well your Honor, it is a peccadillo, but I will withdraw it.

Mr. Hocker: Excuse me, if Your Honor please, I must object to Mr. Derrick's commenting on my objection. I am bound to make objection to the type of question and I think I have a right to do so.

The Court: All right.

By Mr. Derrick:

Q. Will you state who tol you if anybody, that Stoughton was the boss while he was away?

The Court: While who was away?

Mr. Derrick: While Slagle——

A. While Slagle was away? Well Slagle always told us that Stoughton was under him, to do what he said, when he wasn't there.

[fol. 17] Q. I see, who was the boss when Slagel was away?

A. Stoughton.

Q. At the time you went to work for the railroad company, where did you live?

A. Claypool, Indiana.

Q. How far is that from Argos?

A. About twenty-eight miles.

Q. Did you go back and forth to work from Claypool to the job?

A. Yes sir.

Q. How did you go back and forth to work?

A. Drive a car.

Q. With whom?

A. Well with Charles Hopkins, we would take a week about driving.

Q. He was employed with you?

A. Yes sir.

Q. Who else was employed in the section gang?

A. Charles Hopkins, Loyd Fish, Bob Denny, Dick Stoughton and myself.

Q. How much track or area does a section comprise and how much did it comprise in this case, how many miles of track did you have to work?

A. Well I guess it was seven or eight miles maybe in that [fol. 18] section.

Q. What would your duties be with respect to that whole section, what kind of work did you do?

A. Well we would trim the track, that means raise the track up and tamp under, and put in ties and occasionally put rails in.

Q. Now you received an injury while you were employed by the railroad company, is that correct?

A. Yes sir.

Q. About when did you receive that injury?

A. Well it was on or about the 2nd of May, the best I can state.

Q. Where were you working on that day?

A. I was working on what they call the Y.

Q. Where is the Y located with reference to the town?

A. It was located just east of Argos.

Q. About how far east of Argos?

A. Not very far, I would say, it ain't very far, I couldn't say just exactly.

Q. Well would it be in hundreds of yards or a mile or what, give us some idea?

A. Probably a couple of hundred yards east of Argos.

Q. Is Argos a small town?

A. Yes sir.

[fol. 19] Q. About what is the population?

A. Oh, I would say I don't know just exactly, I would say six or seven, ten thousand, something like that.

Q. Thousands or hundreds?

A. Thousands.

Q. It is quite a fair sized town, is that right?

A. It might not be that much, I really don't know the population of it, it could be five thousand, I won't say for sure, it is a small town.

Q. Will you describe the Y which you spoke of where you were working?

A. Well there is a junction there and we were——

Q. Where was the junction?

A. The junction is where the operator works and a clerk.

Q. Where?

A. Where the operator and a clerk works.

Q. You mean by a junction a house?

A. Yes.

Q. All right. Tell the jury about the tracks that were there at the Y?

A. Well these tracks runs east and west, the main, and the other one north and south. What they call the Lake

Erie runs east and west, the main track, the main line runs, [fol. 20] the Nickel Plate, and the Lake Erie runs north and south, I guess or practically north and south.

Q. Is there a track that—this Y—

A. This Y came around to each track.

Q. That is, you mean it connects from one to the other, one railroad to the other?

A. Yes, from one railroad to the other.

Q. Where was this junction that you talk about, the house?

A. Well that was just about, that was anyway near, something near the center of the Y, the track we was working on, I don't know just exactly.

Q. Anyhow it is in the center or about the center of the Y?

A. Yes.

Q. The Y track, that makes a triangle, does it?

A. Um-hum.

Q. What were you doing at the t-me you were injured?

A. Well we were replacing ties, pulling out old ties and putting in new.

Q. Now will you explain to the jury how you put in new ties and pull out the old ones, just tell them exactly how you do that?

A. Well, the boss he generally goes along and he takes the old ties where he wants them put in and they drop the new ones off where they are marked at.

[fol. 21] Q. Drop them off what?

A. You know, off the push car, we place them along where they are supposed to be put in. Then when we get ready to put in, we pull the track, raise the track, take off the plate, loosen up around the ties, dig out the end of them and pull them out.

Q. Do you dig along the edge of the ties?

A. Yes.

Q. The side of them?

A. Loosen up along the sides of them.

Q. How high do you raise the track and the ties?

A. Well it is different, sometimes they raise it just about an inch, sometimes maybe a little more.

Q. Do you recall about what time of day it was that you received the injury?

A. It was some time before noon, around I would say about ten o'clock.

Q. What time did you say?

A. I didn't look at a watch, but it was before noon.

Q. Now had you been pulling ties that morning?

A. Yes sir.

Q. Now will you describe what you were doing, what tie you were working on at the time you were injured?

[fol. 22] A. Well we were—I practically maybe took hold of the tongs and pulled it myself, I don't know for sure, anyway I know Fish had to get on the tie with me, Larry Fish, and we both couldn't pull it and Stoughton was around some where, we asked him, we told him about the tie it was hard to come out or something, so he picks up a bar, walks over to the other end, maybe he says to me, you are not trying. You ain't pulling hard enough. So he puts the tie, fixed a bar under the end of the tie, he got a prizen hold over the rail and give us a lift. We give a pull and it wouldn't come, and he said, you are not pulling, if you can't pull that tie I will get somebody on both tongs that can. That is the words he said to me.

Q. Then what did you do?

A. Well we both get back down and give a hard pull with him a prying and I hurt my back.

Q. What did you do when you hurt your back?

A. I just raised up and turned the tongs loose, I guess I was pretty mad, I said I am never going to pull on a tie like that, that hard again and I walked up the track.

Q. How far up the track did you go?

A. Well not very far. Maybe twenty or thirty steps. Maybe ten or something.

Q. Was Mr. Slagle around at that time?

[fol. 23] A. No sir, Mr. Slagel was in the junction.

Q. You say Mr. Fish was working with you?

A. Yes sir.

Q. Now what happened to the tie, did you work any more on that tie?

A. No, I didn't. But they took the tie out, I seen the tie after they took it out, they turned it over, there was a spike I would judge five or six inches that run through the tie down into the ground.

Q. How many men pulled it out after you got off?

A. Some of the other crew pulled it on out, I don't know just what ones, but they got the tie out.

Q. Now explain the tongs you used as you spoke of?

A. Well the tongs, they have got two handles and they hook over the end of the tie, they work on a hames in the middle and you just hook them over the end of a tie and pull it out.

Q. Now you pulled ties before, maybe some since have you, have you pulled any ties since then?

A. Oh, yes.

Q. How do you ordinarily pull them out, do you usually pull them out by yourself?

A. Oh, yes a lot of times you can pull a tie out right by yourself. It comes out all right.

[fol. 24] Q. Have you pulled them by yourself?

A. I guess I have, yes.

Q. Now directing your attention to the spike down in the ground, what could have been done under those circumstances to prevent you from having to jerk it out there, Mr. Stone.

A. Well the——

Mr. Hocker: Wait there is no question pending, if Your Honor, please.

The Court: I don't understand you, Mr. Hocker.

Mr. Hocker: I say there is no question pending as I understand.

Mr. Derrick: Read what I said, Miss Reporter, I thought I asked him a question, if I didn't I will.

(Question read by the reporter as follows: Now directing your attention to the spike down in the ground, what could have been done under the circumstances to prevent you from having to jerk it out there, Mr. Stone?)

Mr. Hocker: I misunderstood the question, Your Honor.

The Court: All right.

Mr. Hocker: That question calls for a conclusion on the part of the witness, if Your Honor please. I think it is objectionable on that ground.

Mr. Derrick: Well Your Honor, it certainly calls for [fol. 25] a conclusion, but this man is an expert on that,

he worked on it, he knows how it could have been done, that is the very essence of the law suit.

The Court: Well is he an expert, has he had enough work to qualify him as competent to answer such question?

Mr. Derrick: Certainly he has. He has testified he has pulled many a tie, worked for a long time on it.

The Court: About a year and a half, as I understand.

Mr. Hocker: Not that long all together, Your Honor.

The Court: I beg pardon?

Mr. Hocker: Not that long all together, Your Honor. I think he said he went to work in November of '49.

Mr. Derrick: November of '48, that's right, that was his sole job there. I think anybody that worked there any length of time has knowledge about that, how they do that. I think it is very proper.

The Court: You may ask him the question as to whether or not he had ever had experience of that tind before in pulling ties that were hard to pull, see what his experience has been along that line, his testimony now is that they usually came out easily, that he had no trouble.

By Mr. Derrick:

Q. Let me ask you this question, Mr. Stone, have you [fol. 26] had occasion to pull —to run onto a tie that was hard to get out before?

A. Yes sir, we have.

Q. How did you take it out?

A. Well with the jack—if the track wasn't up enough we would dig a ditch alongside of it and kind of slide the tie over into it and pull it on out.

Q. You say turn the tie over, I didn't understand you?

A. Slide it over into a ditch.

Q. Slide it over into another ditch?

A. Yes, dig another ditch along the side of it if you can't get it out.

Q. Could this have been done that way?

A. Yes, I say it could.

Q. But you were directed by Mr. Stoughton to——

Mr. Hocker: I will object to the leading and suggestive form of the question.

Mr. Derrick: All right, I will withdraw it.

Q. Why did you pull it out the way you did?

Mr. Hocker: I will object to that as irrelevant.
Mr. Derrick: That is very relevant.

Q. Why did you pull it out as you did?
[fol. 27] A. I was told to.
Q. Who told you to?
A. Stoughton did.
Q. Now when you jack up a rail, the rails, you raise them up off the tie, is there any danger to the track or do they come on up high enough so that you can get it out?
A. Well you can't jack it too high, you can jack it up plenty enough to slide a tie out.
Q. But now tell me, in your experience how you ordinarily pull or get those ties out, the customary or ordinary way?
A. Well the general thing, you can loosen a tie up, dig out from the end of it with the shoulders of the track up at the end, make a ditch for the tie to come out, then loosen on each side of the tie with a pick, raise the track, take the plates off and it generally pulls right out if there is nothing wrong.
Q. Directing your attention to your statement a moment ago that you jerked on the tie, Mr. Stoughton told you to jerk harder on the tie or he would get some one who would, I will ask just whether or not the jerk that you and Fish made on the tie was ordinarily enough to pull a tie out?
A. Yes sir, it was.

Mr. Hocker: If Your Honor please, just to keep the record straight, I think the question is leading and suggestive. That [fol. 28] is the way I understood the question it is.
The Court: I will overrule the objection, he may answer the question.

By Mr. Derrick:

Q. Did you ever see a tie that you have occasion to pull a tie out with a spike in it before?
A. No sir, I never did, I don't think I ever pulled one with a spike down through it like that.
Q. Now what did you do after you were injured, after you hurt your back, Mr. Stone?

A. Well right at the time I just walked up the track, I was kind of bent over, I had a pretty severe pain so I walked away and naturally rubbed my back; got straightened up a little and directly back, I would say, ten or fifteen minutes I come back on the job.

Q. Did you continue to work the rest of the day?

A. Yes sir.

Q. Now did you make any complaint to anybody about having hurt your back after that?

A. The next morning I told Mr. Slagle I would like to go to the doctor, I couldn't hardly get up out of bed that morning, I was awful sore.

Q. What did Slagle say?

A. Well he just didn't tell me. He didn't say anything.

[fol. 29] Q. Did you continue to work?

A. Yes sir.

Q. Did you mention it again to him that you had hurt your back and wanted to go to the doctor or anything else, tell me the story?

A. Yes sir, I did, different times.

Q. Did you lay off any?

A. Well I missed a couple of days one time there.

Q. Were you living at Claypool, I think you said at the time you were injured?

A. Yes sir.

Q. You are now living at Argus?

A. Yes sir.

Q. When did you move to Argus?

A. Well the 14th day of May, '49.

Q. About how long was that after you were injured?

A. Well I would say it was fifteen to twenty days, something like that.

Q. Did you—did you continue to work there up until when?

A. Till the 7th of June was the last days work I done.

Q. Now were you—did you take any time off, lay off any time from your work?

A. I missed a couple of days.

[fol. 30] Q. Why were you off then?

A. I was hurting too bad to work. My back was too bad off.

Q. Do you remember when that was with respect to the time you moved to Argos?

A. Well I tell you I didn't keep any dates but that was right up towards the last of May.

Q. Did you tell anybody why you were off?

A. Well I missed two days and then Slagle came to my door one evening and told me if I felt like it, if I didn't feel like working I could come on out to the track and stand around and do something if I didn't he would have to report it, make a report of it.

Q. Did you go out to the job?

A. Yes, I went out the next day.

Q. What kind of work did you do, did you do lighter work or the same kind of work after you were injured?

A. Well I done quite a bit of the same kind of work up until the last, then I done lighter work.

Q. Now did you make any request other than the one you have related to Mr. Slagle about getting medical treatment?

A. Yes I did.

Q. About how many times did you make that to him?

A. Well I would say five or six different times, I mentioned [fol. 31] to him maybe more than that.

Q. Did he ever give you a slip or anything to go to the doctor?

A. Yes on the last he did.

Q. Is that what you had to get when they sent you to the doctor?

A. Yes.

Q. Tell us about that?

A. You have got to have a slip to the doctor. —. Why were you asking, telling Mr. Slagle about your injury, was that to get your slip?

A. To get the slip to go to the doctor.

Q. What happened? Tell me the circumstances surrounding the time you did get the slip?

A. Well I walked up to the junction just before work time one morning and I told him, I said, I am too bad off to work, I have got to go to a doctor. And he said, I had waited a hell of a long time or something like that to go to a doctor. So I just told him I went back home. I said, I am going to the doctor slip or no slip. So I went on back home. Then he

brought the slip to me in about, oh, I would say half an hour or maybe three-quarters of an hour after I was up there.

Q. Where were you when he brought it to you?

[fols. 32-38]. A. At home.

Q. How far did you live from the junction?

A. Oh, just, I would say maybe a hundred fifty or two hundred yards or something like that, maybe a little farther. I ain't positive.

Q. You say he gave you a slip to go to the doctor. Would you tell us the name of the doctor to whom you went?

A. Doctor Kelley.

Q. How many times if you recall did you see Doctor Kelley?

A. Well a number of times, I went to him for quite a while.

Q. Were you still working at that time when you were going to him?

A. I worked a few days. I worked up until the 7th day of June, I went to him the 2nd day of June. I went to the doctor.

[fol. 39] Q. You heard the opening statement here that Mr. Hocker made with respect to your making a different statement to the claim agent than you are making now and the statement that I made, I want to direct your attention to that and ask whether or not you gave any statement to the claim agent or not?

A. I made a statement to W. E. Milton, District Claim Agent from Chicago.

Q. What—who was present when the statement was made?

A. Well he had a shorthand with him, I would say, a girl, a stenographer.

Q. Did you tell him about when and how you were injured?

A. Yes.

Q. Do you recall whether you told him about having any trouble with Stoughton or not?

A. Yes sir. I think I told him I had trouble with him, I don't remember telling him all about that, because I didn't figure on anything amounting to anything. All I was after then was to get at ease. Get something to relieve the pain.

Q. Did you at any time tell him that you did not get hurt by jerking at the command or direction of Stoughton?

A. Did I tell him I didn't get hurt? No, I never did tell [fol. 40] I didn't get hurt.

Q. Did you ever see the statement that you gave to him?

A. No. I never did.

Q. How was it taken down, in shorthand?

A. Well in shorthand. A girl taken it down in shorthand.

Q. Did you ever see it after that?

A. No sir.

Q. Was there more than one statement taken?

A. Yes sir.

Q. Tell me about that, both of them. I don't know whether this is the first or second one, tell about the ones you made?

A. The first statement I made out and then he came back in, I will say, two or three weeks, I ain't sure. I didn't keep any dates, but anyway it was from two to three weeks he came back and asked me if I would give another statement. I said, yes. I didn't know why he wanted another statement, he said he lost that statement. It got misplaced, he said, that statement got misplaced. Would I give another one, he said the same way, all I would have to do, he had a different girl with him, a different girl the next time.

Q. Was that statement taken down at that time?

A. Well just about the same way as it was the first time. I give it in, I think, as near as I know as there was only one [fol. 41] way to give it.

Q. You say you didn't tell him exactly what was said between you and Stoughton at the time?

A. No, I don't think I told him exactly what all was said.

Q. Why didn't you tell him all that at that time?

A. Well I didn't think of anything amounting to anything, I didn't think it was necessary, I just didn't tell him, that's all.

Q. That was before you were operated on?

A. Yes sir.

Q. And that was before suit was filed?

A. Yes sir.

Q. Now what were your earnings——

Mr. Derrick: Will you mark these two sheets as 1-A and 1-B, and this one number 2?

(Thereupon the documents above referred to were marked by the reporter for identification as plaintiff's exhibits 1-a and 1-b and number 2.)

By Mr. Derrick:

Q. Mr. Stone, I will hand you what has been marked plaintiff's exhibit 1-A and 1-B, that is the railroad's record of your earnings. Will you look at that and see whether or not that is about correct according to your recollection? Each one represents your two weeks pay, I think?

A. I know.

[fol. 42] Q. Is that about right as far as you know?

A. It is about right, only I couldn't see it all because my eyes——

Q. That is May and June, is that about right?

A. Yes, only——

Q. Could you read it all?

A. I couldn't see very good, April, May and June, I don't see what it is.

Q. Here are the first two weeks——

Mr. Hocker: We can stipulate it is right if you want to, it is up to you.

Mr. Derrick: Well I think it is. I just want to see whether or not he knows it.

A. I can't see very good because my eyes ain't too good.

Q. Tell me then, Mr. Stone, about what your earnings were per month there, just approximately?

A. A month?

Q. Each pay day.

A. Each pay day would sometimes be a hundred dollars a hundred two, and then less, maybe eighty-five to ninety, there is different days, some has it would be a day or two difference. There would be more days in some halves than there would be others. Practically on the average I would [fol. 43] say around two hundred a month.

Q. Around two hundred dollars a month. What year were you injured in?

A. In '49.

Q. When did you quit work?

A. June the 7th.

Q. Of 1949?

A. '49.

Q. 1950, wasn't it the following year, no, 1949, that's correct?

A. '49.

Q. Have you earned any money since then?

A. No sir, I haven't.

Q. Now, Mr. Stone, did you receive—you received a raise during the time you were there didn't you is that correct?

A. Yes.

Q. Do you know whether you were in line for any other raises, were you in the union there?

A. Yes sir, I hadn't joined. I was joining the union, I hadn't been there long enough, I hadn't paid the dues yet, but I had already joined, and I had offered—I think Stoughton was in charge of the union then, I offered him the money once and he didn't have the change. From that I got out, [fol. 44] then I never did pay the dues then.

Q. But the wages were fixed, I assume by contract with the union?

A. Yes sir.

Q. Do you know—did your—when you first went to work there was your work steady, did you work every day or did you lose some time?

A. Well pretty steady work.

Q. How was it when you quit?

A. I was working pretty steady when I quit. I missed a very few days.

Mr. Derrick: I will introduce this, I want to offer in evidence plaintiff's exhibit 1-A and 1-B which is the record of earnings of Mr. Stone during the time he was employed by the defendant railroad company.

I want to offer in evidence also exhibit 2, which is the hospital record of his admission to the Charity Hospital in Cleveland, Ohio and the operative note.

Mr. Hocker: More accurately that is an abstract.

Mr. Derrick: Abstract of it, that is correct. This isn't the report, it is an abstract. We have agreed it may be introduced in lieu of the record, both of them were received, were they not?

The Court: Oh, yes.

[fol. 45] By Mr. Derrick:

Q. All right. Mr. Stone, at the time you were jerking on the tie you say that Mr. Slagle, I believe, was down at the junction, that is the house there, can you tell me where the other persons who were employed with you were, where they were working, how near they were working to you?

A. Well we was all pretty close together. I think Mr. Hopkins was working just west of us, maybe, I don't know, fifteen or twenty feet, I don't know just exactly how close he was and Mr. Denny and Bailey they were back the other way from us some rail lengths or something like that, I would say about thirty feet or something like that.

Q. That is Denny and who else?

A. Mr. Bailey.

Q. Bailey?

A. Um-hum.

Q. Who was working ten or fifteen or twenty feet from you, whatever it was?

A. Hopkins was something like that I guess.

Q. And Mr. Fish was——

A. He was with me.

Q. With you on the tongs?

A. Yes sir.

Q. Anyone else?

[fol. 46] A. Mr. Stoughton, he was helping us get the tie out.

Q. That is all the members of the crew?

A. That was all.

Q. Did you see what happened or how they got that tie out after you were hurt?

A. After they got it out I did.

Q. Did you see them taking it out?

A. No, I won't say I did. I was probably away.

Q. You don't know then how they got it out?

A. No, I don't, I couldn't say.

Q. I see.

A. Because I didn't help get it out, I couldn't be positive.

Q. During the time you were trying to get it out, you say that Mr. Stoughton was helping you, tell just exactly what he did?

A. Mr. Stoughton was using the bar.

Q. Tell us—he was using the bar. Tell what kind of bar is that, Mr. Stone?

A. Well he was just on the other end, he jobbed the bar into the tie and prized across the rail, trying to prize it out. I guess a crow bar or spike bar, I don't know just what kind it was.

Q. How long is a crowbar or spike bar?

A. Well five feet, maybe a little longer, maybe not that long, maybe about five feet, I would say.

[fol. 47] Q. He didn't use any hammer or mallet to drive it?

A. I think maybe they did after I went away.

Mr. Hocker: I will object to that.

The Court: I will sustain the objection.

Mr. Derrick: I just want to know what he was doing while you and Mr. Fish were trying to get it out?

A. Well he was using a bar trying to prize it out with it.

Mr. Derrick: I think that's all. You may inquire.

Cross-examination.

By Mr. Hocker:

Q. When did the accident happen, Mr. Stone?

A. About May 2nd, in '49.

Q. How do you fix that day?

A. What do you mean how I fix that?

Q. How do you know it was about the 2nd of May?

A. Well I just judge as near as I could from the time I went to the doctor, about how far back, I didn't have a record and I didn't have any dates, so I turned it in to the doctor just as near as I could, just about a month, I told the doctor about a month ago, and he said, well that would be about the 2nd of May.

Q. Don't tell what the doctor said. I just want to know how you fix it yourself. You estimate at the time you went to the doctor it was about a month previous?

[fol. 48] A. Yes sir. That is about what I could get at. I guessed at it, I didn't know for certain.

Q. Now you say on or about the 2nd of May, how much

leaway do you allow yourself, do you think you could be off as much as a day, or a week; or how much would you say?

A. Yes, it could be off a day or a week. I wouldn't swear to it.

Q. Could it be off as much as two weeks?

A. I wouldn't think so, but I wouldn't be positive.

Q. Could it be off as much as a month?

A. I don't think it could, to be honest I don't think it could be. I am practically sure it wouldn't.

Q. You are practically sure it wouldn't, the date of May 2nd couldn't be off as much as a month, but you think it could be off as much as two weeks, do I understand you correctly?

A. Well it could be off, because I didn't keep any dates, I was working and I didn't keep the date, I didn't think of anything.

Q. Now isn't it true the first time you talked to foreman Slagel about this was the 31st day of May, just two days before you went to the doctor?

A. No sir, I talked to him before, I asked him about going to the doctor before. I guessed I asked him then too, I ain't certain I know we was working on the crossing down there. [fol. 49] Q. You said a minute ago you spoke to him about it and he didn't say anything?

A. Yes I did, different times.

Q. Could it have been he didn't hear you?

A. Well I wouldn't think so, I spoke it out loud enough for anybody could hear me, because we was right together there.

Q. And he didn't make any response?

A. No, he mumbled something but I never could understand him.

Q. And you just went right on ahead working?

A. Well yes.

Q. You never made any effort to see a doctor during that period of a month to six weeks, not to exceed, if I understand you, two months, before this 2nd of June?

A. I asked to see the doctor, and I finally had to quit work, then I got to go to the doctor.

Q. In a town of six or seven or ten thousand people there are probably several doctors aren't there?

A. There is more than one.

Q. And you don't know what day it was you got hurt?

A. To be exact, I don't. I won't be positive of the date.

Q. You are not even sure you were hurt in the month of May, this occurrence took place in the month of May, you are not even sure of that?

[fol. 50] A. I am not even sure of it, but it was somewhere the 2nd of May, either way, it couldn't vary I wouldn't think very much.

Q. You think it could have been as early as April?

A. No, I don't. What do you mean, it could be back in April or——

Q. Yes. You think it could have been as early as the month of March?

A. I wouldn't think so.

Q. But you are not sure about it?

A. Just like I said, I am not definitely sure of any date. Although I know it was somewhere, the best—I just guessed at it to be some where about a month, after, after I first consulted the doctor.

Q. Then it could have been in April, and it could have been in March?

A. It could have been in April, I won't say it couldn't, But I wouldn't say it could be in March, no.

Q. But you are not sure of that?

A. No sir, I am pretty sure it couldn't be that far back.

Q. You are pretty sure it couldn't have been that far back?

A. I am pretty sure, because I couldn't make that much difference.

Q. You said you had two boys that are old enough to help [fol. 51] you with the garden?

A. I have got one boy seventeen, he will be seventeen his birthday, and one twelve.

Q. They were living with you during that period were they?

A. Yes sir.

Q. And of course Mrs. Stone was living with you during that period?

A. Yes sir.

Q. I suppose you told Mrs. Stone the day this happened, didn't you, that you had hurt your back?

A. I certainly did, when I went home that night I told her about it.

Q. Probably told the boys about it too, didn't you?

A. No, I don't recall ever mentioning it to the boys.

Q. Well they were all there that evening weren't they?

A. Well they probably was. I wouldn't say for sure, I don't remember that.

Q. Are you sure this accident happened on the north Y?

A. I am very sure. Definitely sure.

Q. Didn't you when you first told Mr. Slagle about it on the 31st of May, didn't you tell him it happened down on—what is the name of that main street in Argos?

A. Michigan Street.

[fol. 52] Q. Michigan Street. Didn't you tell him at first when you told him about it on the 31st of May, that the occurrence took place down on Michigan Street?

A. No, sir, I told him we was working on the crossing that day, we worked on the Michigan crossing, I asked him to let me go to the doctor, I said, Slagle, now about letting me go to the doctor while I am close right here in town? I remember saying that, but I never did say I was hurt down there.

Q. To refresh your recollection didn't you tell Slagle that you hurt yourself working on the Michigan Street crossing about a month before, and Mr. Slagle told you you weren't working on the Michigan Street Crossing about a month before, and did you then tell him that you hurt yourself in that Y?

A. No, I never did tell him that. I always said I got hurt on the north Y, where I did get hurt. I asked him to go to the doctor when we was working on the Michigan crossing, I do recall that.

Q. Now you continued to work there in the gang from whenever it was that you got hurt, in April, but not you think in March, throughout whatever remained of April if it was any part of April, and throughout the month of May you continued to work on the job, didn't you?

A. Yes, I worked on.

[fols. 53-61] Q. And you didn't go to the doctor during that period?

A. I didn't until the 2nd day of June.

[fol. 62] Q. Now then you said that W. E. Melton went in to see you in November of '49, is that correct, and asked you about the accident and you told him with a court reporter there writing like this lady?

A. Yes he came to see me but I don't recall just what day it was, I didn't keep no date.

Q. Would you say whether or not the 15th of November would be about correct?

A. Let's see, June, July, I guess it was about four months, something like four months after I saw Doctor Kelley before I seen the Claim Agent.

Q. All right.

A. Three or four months. I won't say just when, but you say quite a while.

Q. I am going to ask you, Mr. Stone, if these questions [fol. 63] and answers were asked you at that time, this happened according to the record on the 15th of November. You don't remember that date as being accurate do you?

A. Well no, I don't.

Q. Does that sound about right to you?

A. When the Claim Agent came, is that what your are talking about?

Q. Yes, when he took this statement from you?

A. Well it might be about that time, I never put it down, I don't recall.

Q. Was Mrs. Stone there at the time the statement was taken?

A. Yes sir.

Q. Was anybody else there?

A. Well the girl that was with the Claim Agent.

Q. All right, do you remember when he came in Mr. Melton said, "My name is Melton, I represent the Nickel-plate Road, this is Mrs. Green, we would like to have you tell us just what your condition is and what it has developed from as best you know and the circumstances from any strain or incident you may have had on the railroad. To begin with we will get your personal history, in here. What is your name?" Answer: Prock Stone. Do you remember his making a statement and asking you that question?

A. Yes sir, I remember.

[fol. 64] Mr. Derrick: If the Court please——

Witness: He asked——

Mr. Derrick: Just a minute, I am going to object to the reading of that testimony, he was never given a copy of that.

Mr. Hocker: You haven't asked for a copy.

Mr. Derrick: Will you wait until I get through making my objection?

Mr. Hocker: All right, go ahead. Make your objection.

Mr. Derrick: Well let me talk. Will you show me the courtesy of making my objection? Then you can talk, I will give you a chance. I want to further object to that, Your Honor, because Mr. Stone was not given a copy of that, and he doesn't know whether those statements were made or not because he has never seen that.

Mr. Hocker: Now may I——

Mr. Derrick: It was taken down in shorthand. He has no way of knowing whether or not they were transcribed by her or anything else.

The Court: I will overrule the objection. The question is whether or not he recalls making the statement.

Mr. Hocker: And he said he did, Your Honor.

Mr. Derrick: He didn't answer.

Mr. Hocker: Well read it.

[fol. 65] The Court: I remember, all right.

By Mr. Hocker:

Q. You said that is what he did say, isn't it, Mr. Stone?

A. When he came in he said his name was Melton, and he represents the Nickelplate railroad.

Q. Then he introduced the lady with him as Mrs. —— you don't remember her name?

A. I don't remember her name.

Q. Did he give you her name?

A. I believe it could have been Mrs. Green. I wouldn't say, I wouldn't say, I didn't pay that particular——

Q. Then he asked you your name and you said Prock Stone, did you give that answer?

A. Yes sir. My name is Prock Stone.

Q. All right. How old are you? Answer: Forty-five, did you give that answer?

A. I guess I did, I was forty-five at that time.

Q. Where were you born, Mr. Stone? Answer: I was born at my home town, Salyersville, Kentucky.

A. Salyersville, Kentucky.

Q. Is that right?

A. Yes sir.

Q. You are presently married?

[fol. 66] A. Yes sir.

Q. Answer: Yes. And Mrs. Stone's given name is what? Answer by Mrs. Stone: Grace.

A. That's right.

Q. Did she give that answer?

A. I suppose, that is her name, I guess she did.

Q. And how many children do you have? Answer by Mrs. Stone: Four. Do you remember that?

A. Yes, I guess I do.

Q. Their ages? Answer by Mrs. Stone: Ernie is fifteen, Lanny is ten, Larry is eight, Robert is four. Did she give those answers?

A. I suppose she did.

Q. You are now employed by the Nickelplate road as a track man? Answer: Yes. Question: And your home is here in Argus? Answer: Yes. Question: this is your home? Answer: Yes, right here. Did you give those answers?

A. That was my home, yes, right there.

Mr. Derrick: That isn't what he asked you, Mr. Stone. He asked you whether or not you gave those answers. He is not asking you where your home is, do you recall whether you gave those answers or not

A. Well, I—he could have asked me that question, I wouldn't say for sure. It is quite a while ago. I have no [fol. 67] remember of it, but I do remember him asking me questions.

By Mr. Hocker:

Q. Is there a street address? Answer by Mrs. Stone: Route 1.

Mr. Derrick: I am going to object to answers or any statements made by Mrs. Stone.

Mr. Hocker: Well they were made in his presence, if Your Honor please.

Mr. Derrick: Yet I want to make that objection, if the Court please.

By Mr. Hocker:

Q. Well what route did you live on?
A. Route 1.

Q. Route 1, all right, then her answer wouldn't hurt very much. Now then he asked you a number of questions about how you came to work for the railroad and where you were living at the time.

Mr. Derrick: I am going to object to that and move that that be stricken.

Mr. Hocker: I will read it if you want me to.

Mr. Derrick: Read it or keep your mouth shut. One or the other.

Mr. Hocker: If you want me to read it I will read it.

Mr. Derrick: That is highly improper and I move that that remark be stricken from the record and the jury instructed to disregard it.

[fol. 68] The Court: The motion will be overruled.

Mr. Hocker: Something was said a moment ago, Your Honor, about giving the other lawyer courtesy. Mr. Derrick has just suggested that I keep my mouth shut. I wonder if that requires any attention by the Court?

Mr. Derrick: Well if the Court please, he was stating what this thing contains, that is what I was objecting to. Now we all know that is improper for him to state what it contains, and that is what I objected to, Your Honor, and you know as well as I do that that is not the proper way for him to say what this contains here.

The Court: Well I suppose it was to save time that Mr. Hocker said he will read the questions and answers if necessary. Miss Wood, you need a little rest now.

Mr. Hocker: The statement is twenty pages long, Your Honor, I thought we would avoid reading the part that I wasn't particularly interested in, but we will read all twenty pages if Mr. Derrick prefers.

Mr. Derrick: I would prefer seeing a copy of what you are reading, Mr. Hocker, I never seen that.

Mr. Hocker: I am introducing it in in evidence, you will

he given a copy of it, Mr. Derrick. There is a procedure for obtaining any evidence as you well know.

[fol. 69] The Court: We will take a short recess and during the recess period perhaps you can determine what parts of the statement it is necessary to read.

(Temporary recess.)

By Mr. Hocker:

Q. Going on with this statement, do you remember the following questions and answers being asked you by Mr. Melton in the presence of Mrs. Green and written down by her: Question: You began to work for the Nickelplate when and where? Answer: Claypool, November 7th, 1948. Question: And that was an extra gang was it? Answer: Yes. Question: Sometime after that you were furloughed? Answer: Yes, we got laid off and I had to bump in. You see. Did you give him those answers?

A. Yes sir.

Q. And you bumped in here at Argos? Answer: Yes. Question: And that was in February of '49? Was that February? Answer by Mrs. Stone: Yes, in February we came over here when you was transferred over here, I don't know the exact time, but it was in February. Do you remember those answers being given?

A. What do you mean we moved in February? Is that the way it is.

Q. That is the way it is, Mrs. Stone answered, you bumped in here in Argos in February, we came over here when you was transferred over here. I don't know the exact date, but [fol. 70] *but* it was in February.

A. Yes, when I was transferred here.

Q. All right.

A. When I got bumped in over there, I don't know the date, I don't remember the date, but I bumped in.

Q. All right. Question (By Mr. Melton): We are appreciative of any information you can give us, Mrs. Stone, but if Mr. Stone can give it to us we would like for him to answer, and you can fill in. Question: So you worked in February '49 for the section at Argos for what foreman? Answer: Gene Slagle. Gene Slagle. Do you remember that?

A. Yes sir.

Q. What section, do you know? Answer: Seventy-six. Question: And you continued to work in that gang until what time, I mean what day did you actually lay off and not go back to work? Answer: I worked to June 7th, June 7th was my last days work. Do you remember giving that answer?

A. Yes sir.

Q. Question: As track man, what do you earn? Answer: At that time it was eight fifty-two, I think. And after that they got that raise, anyway we got about eight fifty-two I think. Question: Eight hours a day? Answer: Yes.

A. Yes.

[fol. 71] Q. Is that your recollection? Question: Do you know what our hourly rate was? Answer: One, o, eight, I think. I think one-o-eight. I think that is what it was. Do you remember giving that answer?

A. Yes sir.

Q. Do you remember what day it was you first laid off? Answer: You mean the last day I worked? Question: No, you said the last day you ever worked was June 7th. But what day did you lay off and have the foreman take you to the doctor? Answer: June 2nd. Did you make that answer?

A. Yes sir.

Q. Question: You asked to go to see the doctor here in Argos on June 2nd? Answer: He gave me a paper to go on. Question: An authorization? Answer: Yes. Question: Do you remember giving that answer?

A. Yes sir.

Q. Question: Had you laid off before June 2nd, as far as you remember? Answer: I don't think so. I couldn't say for certain I don't think so. Question: I see. Just how come you to go to the doctor that day, I mean how did you go up there, what did you say, describe the circumstances between you and your foreman? Answer: I was going to the doctor because my back was hurting, when I went to the doctor I told him I said, I hurt myself about a month previ-

[fol. 72] ous. I thought it was a month, he put May 2nd. He wanted me to tell what I was doing. Do you remember giving that answer?

A. I think so. I think that's right.

Q. Question: What I want to know now is whether or not you know what day you got this strain? Answer: The exact date? Question: Yes, if you know. Answer: Not the exact date, I sure don't. Do you remember giving that answer?

A. Yes sir.

Q. Could it have been prior to May 2nd? Answer: It could have been, yes, because I didn't keep the dates you know. I didn't think it would amount to anything. Question: And you just kept working? Answer: Yes. Do you remember that answer?

A. Yes sir.

Q. Question: If you will just tell me the circumstances of the incident you think caused you to have to go to the doctor, in other words, when and where and what? Answer: Well what caused me to go to the doctor was that strain, you see it hurt and bothered me, got to hurting, bothered me all along. Then it would get better and I kept lifting and it hurt all over again, and I had to go to the doctor. Do you remember giving that answer?

A. I ain't positive, I guess that's right, I ain't sure.

Q. Question: Just where was it that that occurred, in [fol. 73] other words the track, the location? Answer: It was right up here on the Y. Just back of the junction, but I don't know just exactly the number of that track. Did you give that answer?

A. I did.

Q. But it was on the Y track? Answer: Yes. Question: In other words the track leading from the Nickelplate rails to what other rails? Answer: Isn't that all Nickelplate? Let me see. Question: At Argos here is the junction of the Nickleplate tracks and another railroad, is it not? Answer: Yes, but that is a branch of the Nickelplate, isn't it? Did you give that answer?

A. Yes sir.

Q. Question: Do you know what they call that, the Lake Erie? Answer: I believe it is. Did you give that answer?

A. That is right, I gave that answer.

Q. Question: This Y curves from the Nickelplate to the other? Answer: It curves right down. Question: And

that is the track you were hurt on? Answer: That's the one. Did you give that answer?

A. From the Y, yes sir, it runs into the two tracks, yes sir, I give that answer.

Q. Question: Then it wasn't at the Michigan Street crossing? Answer: No. Question: Do you remember having done work at the Michigan Street crossing, do you? An-
[fol. 74] swer: Yes. Did you give that answer?

A. Yes.

Q. Question: So if the foreman's record shows when the different jobs were done, that would be on the date this happened, the date they were doing work on the Y? Answer: Yes, it was on the Y. Did you give that answer?

A. Yes sir.

Q. Question: Just what were you doing, describe that? Answer: I was pulling old ties out and replacing them with new. Question: Did you have the old ties jacked up? Answer: Yes, they was jacked up, all the ties we was pulling on. It had about a five and a half inch spike clear through the tie and into the ground. Did you give that answer?

A. Yes sir.

Q. Question: Tell what happened? Answer: Well the tie got loose, I couldn't figure out what was holding it, so I pulled and I got a catch right in here. Did you give that answer?

A. Yes sir.

Q. Question: You are indicating the right hip, right side of the lower back and hip? Answer: Yes. I got a kink and couldn't straighten up for a little while. I kept walking around and then went back to work. Did you give that answer?

A. Yes sir.

[fol. 75] Q. Question: In other words you were pulling on this tie and pulled too hard and felt a strain? Answer: Yes. Did you give that answer?

A. Yes sir.

Q. Question: Is that the circumstances of this strain, you pulled too—Answer: I don't know where I pulled to, I just strained my hip here. Did you give that answer?

A. I don't recall that.

Q. Question: While you were pulling? Answer: While was pulling. Question: Which side of the track were

you on? Answer: On the far side. Question: The north side? Answer: Yes, it is on the north side. I was pulling to the north. Did you give those answers?

A. Yes sir.

Q. Question: Pulling to the north? Answer: Yes. Question: And you said there was another fellow there? Answer: Yes. Question: Who was that fellow? Answer: Fish. Did you give those answers?

A. Yes sir.

Q. Question: How were you pulling on the tie? Answer: Tongs. Question: Regular tie tongs? Answer: Regular tie tongs. Question: Did you have hold of one handle and he the other handle? Answer: Yes. I was one side, around [fol. 76] it with both hands like this. (Indicating.) I was bent over pulling this way. Question: Pulling toward you, you were indicating? Answer: Yes. Did you give those answers?

A. Yes sir.

Q. Question: And this tie seemed to pull hard, at least harder than the others had pulled? Answer: Yes, the tie seemed loose but then something seemed to be holding it, and we thought it wasn't coming out, and after we got it out we saw what was holding it. Did you give that answer?

A. Yes sir.

Q. You turned it over to see? Answer: Yes. Question: And there was a spike there? Answer: Yes, about five inches or five and a half inches into the ground. Did you give those answers?

A. Yes sir, I did.

Q. Question: What was it you said, it was sticking through the tie about five inches? Answer: Yes. Question: You mean protruding from the tie about five inches? Answer: Yes, about that it seemed to me. Did you give those answers?

A. Yes sir.

Q. How long are spikes? Answer: You mean railroad spikes? Question: Yes. Answer: It wasn't that spike, it [fol. 77] was a crossing spike. This spike went through and about five inches on the other side. Did you give those answers?

A. I gave the answers, I thought it was a crossing spike, I didn't know for sure, but it looked like a crossing spike.

Q. Question: Was this a spike with a head on? Answer: I don't know if they call it a spike. Did you give those answers?

A. I didn't even see the head, I didn't even look, it was in the wood.

Q. Question: Have you ever seen spikes sucking through the ties before? Answer: Not except those crossing spikes. Did you give that answer?

A. Yes sir.

Q. Question: You have seen them go through ties before, have you? Answer: Yes. Question: You continued working that day? Answer: Yes. Question: You worked that day out? Answer: Yes. Did you give those answers?

A. Yes.

Q. Question: And continued working for some time after that? Answer: Yes. Question: You didn't fall down at any time? Answer: No, I didn't fall. Question: And nothing struck you? Answer: No. Question: And nothing struck your leg or foot or anything? Answer: No, nothing ever hit me. Did you give those answers?

[fol. 78] Answer: Yes sir.

Q. Question: It was just the force of the pull? Answer: Yes, just the pull, the jerk. Question: Was the other fellow with you pulling evenly? Answer: You couldn't tell much how the other fellow was pulling. Did you give those answers?

A. I ain't positive, I think I told him we both was pulling on the tie together. I don't know just how I give the answer.

Q. Question: I mean he wasn't laying down on the job?

A. No sir.

Q. Answer: No.

A. That's right.

Q. Question: He was pulling with you? Answer: Yes.

A. Yes sir.

Q. You gave that answer?

A. Yes sir.

Q. Question: He didn't give you any unexplained jerk, give you any unexpected jerk? Answer: No. Did you give that answer?

A. Yes sir.

Q. Question: He didn't give any unexplained jerk?
A. I guess that's right, I don't think he give any.
Q. Question: You continued to pull other ties that day? Answer: No, not that afternoon. I dug along the side, loosened them up. Did you give that answer?
[fol. 79] A. Yes sir.
Q. Question: I mean after this one tie where you strained yourself, you pulled other ties out? Answer: Yes. Question: Did you use the same tongs? Answer: No. I couldn't say because we had four or five sets of tongs. We would throw one down and pick up another pair. Did you give that answer?
A. Yes sir.
Q. Question: You didn't presently change tongs after that? Answer: No. Question: That set of tongs didn't break at that time? Answer: No. Question: Anything defective about the tongs? Answer: No, not that I know. The tongs didn't slip off or anything. Did you give those answers?
A. Yes sir.
Q. Question: Then when did you first report this to the foreman? Answer: I reported that evening. I told him, I said, I kind of hurt myself, but I don't think it will amount to anything, and that was all that was said. Did you give that answer?
A. Yes sir.
Q. Question: Did you say anything to the other men? Answer: Oh, yes, they were all there together. I said, I hurt my back. Do you remember giving that answer?
A. Yes sir.
[fol. 80] Q. Question: Do you know who you said that to? Answer: They were all there in a bunch. I didn't say it to any particular one. I just said I hurt myself. Didn't say it to any particular one, just walked up the track a few steps, kind of kept straightening up, then came back to work. Did you give that answer?
A. Yes sir.
Q. Question: Then what happened later, did this condition persist? Answer: It got better, my back the next morning was pretty sore. I couldn't hardly get out of bed but I went back to work. I mentioned that to the boss

when I came back, I said, I should go to the doctor, I couldn't hardly get up this morning. Did you give that answer?

A. Yes sir.

Q. Question: Was that the next day? Answer: The very next day. Then I mentioned it to him, I would say, I mentioned it four or five times about going to the doctor, but he didn't seem to say anything, and I didn't force it, I didn't push it on him, only one time, putting the crossing in here on Thirty-one. Do you remember giving those answers?

A. I told him, I asked to go to the doctor when we was working on the crossing on Thirty-one, I remember that.

Q. Question: The Michigan Street crossing? Answer: Yes, I mentioned going to the doctor, then I said, I should [fol. 81] go to the doctor. He didn't say anything so I didn't mention it any more. Did you give that answer.

A. Not until the time that I went to—I don't guess I mentioned it any more until I got the slip to go to the doctor, the morning I went.

Q. You gave that answer, right?

A. I suppose I did, I ain't for certain.

Q. Question: You didn't go to the doctor then, that is referring to the Michigan Street crossing?

A. No, I didn't get to go that day, no. I asked to go, but I didn't go.

Q. Answer: No. Question: What was your complaint when you did go to the doctor? Answer: The same place. Question: Did anything else begin bothering you later other than your right hip, you indicated here? Answer: Yes, later on when I went to the doctor it hurt clear down my leg. Question: How far down? Answer: Clear to my ankle. The doctor said my main big muscle right down the leg. Did you give that answer?

A. Yes sir.

Q. Question: Then after you went to the doctor, that was June 2nd? Answer: June 2nd. Did you give that answer?

A. Yes sir.

Q. Question: Then you worked a few days? Answer: [fol. 82] Yes, I said to the doctor, I would like to work on. What I thought was I could get something to bathe my leg in and go on working. I said, I would like to go back

work, and he said, yes. Do you remember giving that answer?

A. Yes sir.

Q. Question: What did he do for you? Answer: He gave me some salve of some kind to bath in. Question: To rub on? Answer: To rub on. Did you give those answers?

A. Yes sir.

Q. Question: Did he inject you? Answer: Yes. Question: Where did he do the injection? Answer: On the back part of my calf here, from the knee down. Did you give that answer?

A. Yes sir.

Q. Question: Did he ever inject you around the hip? Answer: No, yes he did too. Penicillin shots in my hip, all the penicillin shots I taken was up here (indicating the hip). Did you give that answer?

A. Yes sir.

Q. Question: Did he give you medicine to take internally? Answer: Pain tablets. Question: Do you know when you last saw Doctor Kelley? Answer: Do you mean now, what time I last saw him now? Question: I mean how long did you continue treatments with him? Answer. Well I seen him last Friday. What date was that, what date is [fol. 83] today? Answer: The 15th. Question: The 15th? Answer: I was to him Friday, but I didn't take any treatment. Now do you remember giving those answers?

A. Did he give me any treatments? Yes sir.

Q. What did you go for? Answer: He was going to send me to the doctor in South Bend, and I had to go down there and get his address, where to go. Question: I see, in other words you were going to a private doctor? Answer: Yes. Question: Did you go? Answer: Yes, I was to him. Question: When was that? Answer: Monday. Question: Yesterday? Answer: Yes. Question: What is that doctor's name? Answer: Robert Akron. Did you give that answer?

A. Yes sir.

Q. Question: Do you have his address? Answer: South Bend, 418 Charland Building. It is on the right on Thirty-one. Question: Did he diagnose your trouble, did he tell you what he thought was the matter with you? Answer: No, he didn't tell me. Just said he would send Doctor

Kelley a letter, and I figured I would probably get one too. I wouldn't know, that is the doctor I went to Monday. Did you give those answers?

A. Yes sir.

Q. Question: Then as far as you figure your trouble was caused or started by the time at the Y when you were pulling out these ties and you just pulled hard and got [fol. 84] a catch? Answer: That's when it started. There was trouble all along, there was times when it hurt but I didn't pay any attention, I kept on, I didn't stop working. I lifted pretty hard on a rail out there a couple of days before I went to the doctor, maybe three days. I didn't keep account, but anyway a few days before and it hurt pretty bad and I went to the doctor. Did you give that answer?

A. Yes sir.

Q. Question: No new place? Answer: No, but it hurt so bad I went to the doctor while I was working between June 2nd and June 7th, it hurt. Those days I worked it still hurt but I hoped it would get better. Those days it hurt too bad so I couldn't work. Did you give that answer?

A. Yes sir.

Q. Question: But you don't recall the date this work was done on or about the time this work was done on the Y there when you were pulling out old ties? Answer: I didn't keep track of dates, but I told my doctor when I went to him on June 2nd, that I had got it about a month ago. Did you give those answers?

A. Yes sir.

Q. Question: Could it have been as far back as the last of March or the first of April, about two months before? Answer: No, I don't think so. I don't think I would miss it that bad. It might have been in April, sometime toward [fols. 85-92] the last of April, or it could have been the middle of April, I don't know, I didn't keep the date. But to the best of my knowledge it was about a month before. Did you give that answer?

A. Yes sir.

Q. Question: You just kept working after? Answer: Yes.

A. Yes sir.

Q. Question: You just kept working then, you didn't think it would amount to anything? Answer: Yes. Did you give that answer?

A. Yes sir.

[fol. 93] Q. Question: In connection with this strain you got pulling on the tie, you have told me all you know about that? Answer: Yes. Do you remember giving that answer?

A. I ain't positive, I guess I did, I ain't positive.

Q. Next question: In other words there is nothing about that incident you haven't told me? Answer: No, I think I have told you all that happened, all I can remember. Did you give that answer?

A. I guess I did, I ain't sure, now, I guess so.

Mr. Hocker: That's all.

[fol. 94] Redirect examination.

By Mr. Derrick:

Q. Mr. Stone, is there anything here in these questions and answers that he read you that conflicts with what you have said here?

Mr. Hocker: Just a minute. That question is for the jury, if Your Honor please. Not for Mr. Stone.

The Court: I will sustain the objection.

Mr. Derrick: All right. Let me ask you this.

By Mr. Derrick:

Q. Was there any reason why you didn't tell him in here about the jerk, about Mr. Stoughton telling you to jerk harder on there?

A. Yes sir, I didn't think the thing would amount to anything, all I was wanting then was to get to a doctor and get able to go back to work. That is all I was interested in, that's all I am—at that time I was suffering bad with pain, and I was wanting to get to a doctor and get well and get back to work.

Q. Did you know then that you would have to have an operation or anything like that?

A. No, I didn't.

Q. Did he ask you whether or not anybody had told you to jerk or anything like that?

A. No.

Q. Did he ask you whether or not you had any difficulty [fol. 95] with your foreman or anything like that?

A. I don't recall he did.

Q. Did you ever tell him at that time or any other time that you had any difficulty with your foreman or straw boss?

A. Well I don't know whether I told him or not, I ain't sure.

Q. How long was this after the injury occurred, do you recall, was this prior to the time or at the time you were going to Doctor Kelley?

A. I was going to Doctor Kelley when I was giving that statement.

Q. Is this the gentleman you said came down in response to the letter you wrote?

A. Yes.

Q. What was your purpose in writing the letter?

Mr. Hocker: I think that is irrelevant, Your Honor.

Mr. Derrick: I don't think so, I think it is very pertinent.

A. Why, because——

Mr. Hocker: Wait a moment.

The Court: I thought he had already testified why he wrote the letter, didn't he?

Mr. Derrick: I don't recall whether he did or not. He may have.

The Court: Well I will overrule the objection. He may [fol. 96] answer the question. You may answer.

A. Because I was getting, Doctor Kelly wasn't doing me any good and I thought I wanted to get to a specialist to get to see what was the matter with me.

Q. I think you said you wanted to get back to work, is that correct?

A. I did, yes.

Q. Is there anything else about this that you want to explain, that you can explain now?

Mr. Hocker: Well now wait.

The Court: Oh, yes, I will sustain the objection to a general question of that kind, Mr. Derrick.

Mr. Derrick: All right.

By Mr. Derrick:

Q. Did you understand at the time you gave that that you were to give any details such as you have related here of what, about why you jerked?

A. No, I didn't understand any of it.

Q. Did you just answer the questions that he asked you, is that right?

A. That's right.

Q. Now——

A. (Interrupting) As near as I could.

Q. Mr. Stone, there were others working with you right [fol. 97] there at the time who were close to you when you were ordered to jerk on this tie, correct?

A. Yes sir.

Q. Who was closest to you as you recall?

A. Well Lloyd Fish was working by the side of me.

Q. And who was the one next nearest to you?

A. Well Dick Stoughton is next nearest to me.

Q. And who was next?

A. Charles Hopkins.

Q. Where was the next man?

A. There was two more men who was up there somewhere. I will say thirty feet or something. I don't recall as I said a while ago, I ain't right sure how far away it was. I know we was all right pretty well together.

Q. Was there any discussion, don't tell what it was, but was there any discussion between you and any other member of the crew about the way that Mr. Stoughton had directed you to work that day?

Mr. Hocker: Wait a minute.

A. Yes sir, there was.

Mr. Hocker: I didn't get a chance to object before the witness answered, Your Honor. I object.

[fol. 98] The Court: Sustain the objection.

Mr. Hocker: It is hearsay and I ask that the jury be instructed to disregard the answer.

The Court: The jury will disregard the answer.

By Mr. Derrick:

Q. What was the ground of that?

Mr. Hocker: It is hearsay. It is also leading and suggestive.

Mr. Derrick: No.

By Mr. Derrick:

Q. Did you have any discussion with Mr. Staughton immediately after your jerk there?

Mr. Hocker: Well I will object to that as irrelevant.

Mr. Derrick: Well that is very relevant. Right after you jerked there what did you say?

The Court: I will overrule the objection. I think he has already covered that, it appears to me that is repetition. I say I think it is repetition, but if you think it hasn't been brought out, he may answer. You may answer the question.

A. What do you mean now?

By Mr. Derrick:

Q. What did you say, if anything, immediately after you jerked and had this catch in your back, or this pain in your back?

A. Well, you mean Mr. Stoughton, I suppose, I said——

Q. Yes?

[fol. 99] A. You mean me? I said, I am not pulling on no damned tie that hard any more. I think that's what I said.

Q. Did Mr. Stoughton say anything to you then?

Mr. Hocker: I object to that as irrelevant and hearsay.

Mr. Derrick: It is not hearsay, it is binding on the defendant.

The Court: I will overrule the objection.

A. He didn't say anything.

Mr. Hocker: What was Your Honor's ruling?

The Court: I overruled the objection.

Mr. Hocker: There is no showing of the capacity of Mr. Stoughton to make admissions if that is the basis.

The Court: Well that is probably true.

Mr. Derrick: He answered he didn't say anything.

A. Yes sir.

By Mr. Derrick:

Q. Did Mr. Stoughton direct you in your work at other times?

A. Yes sir.

Q. Tell about his capacity there, describe his work all about him that you recall?

Mr. Hocker: I don't see what the purpose of that is. He went over that before.

A. Well he was left in charge.

[fol. 100] Mr. Hocker: That is stating a conclusion.

By Mr. Derrick:

Q. How do you know he was in charge?

Mr. Hocker: Wait a minute, I would like to have a ruling on my objection.

The Court: Mr. Derrick, this is repetition, we have been all over that.

Mr. Derrick: Then I think there has been a showing that he was in the capacity of straw boss or foreman.

Mr. Hocker: There is nothing pending here, Your Honor.

The Court: Of course this witness has testified as to what his duties were or what he did.

Mr. Derrick: I thought Your Honor ruled that we had not made a showing as to that, that is why I asked the question again.

Mr. Hocker: When he said Stoughton didn't say anything I withdrew the objection.

The Court: I didn't rule that you hadn't made a showing.

Mr. Derrick: I didn't understand, that is why I asked the question again.

The Court: I don't recall making such a ruling.

Mr. Derrick: I think that's all.

[fol. 101] Recross-examination.

By Mr. Hocker:

Q. Just let me ask you one or two more questions, Mr. Stone. In any event when these questions and answers that I read to you from the statement, they were substantially as you recall the conversation between you and Mr. Melton in November 1949?

A. Not as I recall.

Mr. Derrick: I didn't understand you.

By Mr. Hocker:

Q. I say, the questions and answers I read you when I read you this entire statement were as you recall the conversation between you and Mr. Melton in November, 1949, was it?

A. Yes.

Q. And you were off work then about six months, is that right?

A. I don't know just how long I was off work when he came in. I don't think I was off that long when he came.

Q. Well if he came in November, you were off work in June, that would be about six months?

A. Well yes, but I don't even know what day he come, to be honest I don't.

Q. Had you at that time made application to the railroad retirement board?

A. Yes.

Q. And you didn't tell him anything a that time about [fol. 102] being told to pull harder on the tie?

A. I don't recall whether I did or not.

Q. What?

A. I don't recall whether I did or not.

Q. In any event you saw Mr. Dudnik in February, the following February, three months later and employed him to represent you, is that right?

A. Yes sir.

Q. You told him about how the accident happened?

A. Yes, I think I did.

Q. In fact you probably had several conversations with him?

A. Yes.

Q. I don't want to ask you what you said to him or what he said to you, but you did have several conferrences with him did you not?

A. No, not several, just that one time.

Q. Just that one time?

A. Oh, I have been there since, but I mean whenever I went there——

Q. That's right, suit was filed in the following August, August of '49, is that right?

A. August?

Q. That is what the file shows?

[fol. 103] A. Well I don't know.

Q. All right. August of '49, and then at that time you alleged that some one had told you to pull harder than you should have, in August of '49. Let me ask you this.

The Court: You mean '50, do you not?

Mr. Hocker: I beg your pardon, I mean '50, thank you Your Honor.

Q. The following year you employed him in February '50, suit was filed in August, 1950, and at that time it is alleged that some one had told you to pull harder than you were pulling. Had you at any time prior to the time suit was filed ever told anybody connected with the Nickelplate that some one had told you to pull harder than you were pulling?

A. I don't get your question just right. I don't understand.

Q. Let me ask you this question, did you ever take Mr. Fish up to Mr. Dudnik's office?

A. Mr. Fish up to Dudnik's office?

Q. Yes sir.

A. No sir.

Q. Did Mr. Dudnik ever come down in your presence and talk to Mr. Fish?

A. No sir. Not as I know of. I never seen him.

Q. Did anybody from Mr. Dudnik's office as far as you [fols. 104-106] know ever interview Mr. Fish?

A. No sir.

Q. How does Mr. Fish happen to be here, do you know that?

A. He was working with me, I reckon.

Q. Did you bring him down?

A. Yes. He came down with me.
Q. What?
A. Yes, he came down with me.
Q. Did you make arraugements for him to come down?
A. My lawyer did.
Q. Who was that?
A. Mr. Derrick.
Q. Mr. Derrick. Have you ever had varicose veins?
A. No, no, I never did have.

Mr. Hocker: I believe that's all.

A. I am very glad, I am tired.

Mr. Derrick: May we have about a three minute recess, Your Honor?

[fol. 107] LLOYD FISH, a witness of lawful age produced on behalf of the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Derrick:

Q. Will you state your name, sir?
A. Lloyd Fish.
[fol. 108] Q. Where do you live, Mr. Fish?
A. Argos, Indiana.
Q. Are you acquainted with Mr. Prock Stone, plaintiff in this case?
A. Yes sir.
Q. About how long have you known him?
A. Oh, I would say three years.
Q. Did you ever have occasion to work with him?
A. I have.
Q. By whom were you employed?
A. Nickelplate Railroad.
Q. What was your job or duties?
A. Section hand.
Q. Did you work with Mr. Stone?
A. I did.
Q. Where was the section that you were working on?

A. At Argos.

Q. Did it run on both sides of the town?

A. It goes through the south part of town.

Q. I see. Are you acquainted with a Y that is near Argos?

A. Yes sir.

Q. Will you describe that Y please?

[fol. 109] A. It runs from the—it is where two railroads crosses and this Y runs from one railroad to another. It is so they can shove the cars from the Lake Erie over to the main line of the Nickelplate.

Q. Now is there a house or anything in the center of the Y?

A. A junction.

Q. You call that a junction?

A. Yes sir.

Q. What were your duties with respect to your work for the Nickelplate as a section hand?

A. Oh, help keep the track up in shape, like low joints, tamp it up, put in new ties, whatever needed to be done.

Q. You did put in new ties and pull out old ones, is that right?

A. That is right.

Q. Do you recall an incident when Prock Stone was injured while employed by the railroad?

A. I do.

Q. Do you know about when that was?

A. It was in the spring of the year.

Q. Were you working with him at the time?

A. I was.

Q. Where were you working?

[fol. 110] A. We was working about on the north Y, about, Oh, I would say thirty yards maybe from the junction.

Q. About thirty yards from the junction?

A. Yes sir.

Q. And what were you doing there?

A. Putting in new ties. Pulling out old ones.

Q. How much experience have you had with section hand work?

A. I guess between twenty-eight and thirty months.

Q. Between twenty-eight and thirty months. Has all your employment been with the Nickelplate?

A. That's right.

Q. At the time in question you said you were working with Mr. Stone, will you describe just what you were doing, Mr. Fish?

A. Well we were taking out ties, pulling them out and putting in new ones.

Q. Do you recall an incident where you had a tie that would not come out very easily?

A. I did.

Mr. Hocker: I haven't objected to leading the witness up to now. Mr. Derrick, I will direct your attention to that, that's all.

Mr. Derrick: I will reframe it if there is any objection to it.

[fol. 111] The Court: Well he has answered. Go ahead.

By Mr. Derrick:

Q. Will you tell us about that incident?

A. We was pulling on one that wouldn't come and we doubled up, two of us on the tongs.

Q. Describe those tongs for us, will you?

A. That is—I would say something about like an ice tongs only the length. They hook on each side of the tie, they have got two hand holds up here to pull. Either one man can use them or two men can use them.

Q. Now ordinarily how many men are on the tongs?

A. Oh, generally one.

Q. You say you doubled up on this occasion?

A. We did.

Q. What was the occasion for doubling up?

A. It wouldn't move.

Q. I see. Now go ahead and tell what happened?

A. Well so we doubled up and the tie wouldn't come. We would jerk it, it might move an inch I would say at a time, and Mr. Stone asked for more jack.

Q. What do you mean by more jack?

A. Well we had the rails up off of the tie, you have to have a jack under each rail.

Q. About how far were they up off of the tie?

[fol. 112] A. Oh, I would say three-quarters of an inch.

Q. I see.
A. Mr. Stoughton give the jacks another notch.
Q. Was that in response to Mr. Stone's request?

Mr. Hocker: That calls for a conclusion.

By Mr. Derrick:

Q. You said Mr. Stone asked for it, I believe did you not?
A. Yes sir.
Q. What was done after he asked for that then?
A. Well sir, they——
Q. Was it jacked up any more?
A. Dick said he wasn't pulling hard enough.

Mr. Hocker: That is not responsive to the question. I ask that the witness answer the question, and I ask that that be stricken.

The Court: That part may be stricken, just answer the question please.

By Mr. Derrick:

Q. My question was, after Mr. Stone asked that the rails be jacked up a little more, what was done?
A. I think he give it another notch.
Q. Do you know who did that?
A. I think Dick did.
Q. That is Dick Stoughton?
A. Stoughton.
[fol. 113] Q. All right, then what happened?
A. We still couldn't pull it.
Q. Then what happened?
A. Mr. Stone asked for more jack and we couldn't give it any more, had it high enough then, and so we doubled up and Dick come down with a bar and put it over the south rail and pried on the other end, and pumped it as we jerked and it still wouldn't come. So Prock and I give it a big jerk, that is when he quit and said he hurt his back.
Q. Now was there any conversation between Stone and Stoughton prior to that jerk?
A. Well——

Mr. Hocker: I object to that now as hearsay.

By Mr. Derrick:

Q. Did you hear anything said by Mr. Stoughton?

Mr. Hocker: The same objection, Your Honor.
The Court: I will overrule the objection.
Mr. Derrick: You may answer.

A. They both got hot headed.
Q. Tell just what happened.

Mr. Hocker: I ask that that be stricken as not responsive to the question, if Your Honor please.
The Court: Well I will sustain the objection to the last [fol. 114] statement, it may be stricken.

By Mr. Derrick:

Q. Tell us just what happened, Mr. Fish.
A. Well Dick claimed we wasn't pulling hard enough and, oh, they kind of got into it back and forth.

Mr. Hocker: Now I will ask that that last be stricken as a conclusion of the witness, and not responsive to the question.
The Court: Well I don't know that it — a conclusion of the witness, I will overrule the objection and permit that to stand.

By Mr. Derrick:

Q. Tell us just what words was said, will you?
A. Dick said, he wasn't pulling hard enough, if he couldn't pull to get to hell off of it and he would get somebody that would.
Q. Then what did Mr. Stone do, and what did you do?
A. We give it another pull. That is when Stone quit and said he hurt his back.
Q. Then what happened?
A. He kind of raised up and held his back and I believe it was Buster got onto the tongs with me.
Q. Who is Buster?
A. Hopkins.
Q. Buster Hopkins?
A. Buster Hopkins.
[fol. 115] Q. Did you remove the tie?

A. Buster and I and Dick Stoughton, and believe it was Bert Bailey finally got it out.

Q. It took four of you to get it out, did it?

A. That's right.

Q. Now could you have jacked the rails up high enough to free that tie?

A. The only way we could have done that would have been to drop it and pull the spikes out of the other ties next to it, oh I would say half a rail length, and just raise the rail alone.

Q. Why would you have to do that?

Mr. Hocker: Wait, I beg your pardon, my attention was distracted, Miss Wood, will you read the question and answer preceeding?

(Question and answer preceeding read by the reporter.)

By Mr. Derrick:

Q. By doing it that way would that have freed the tie from the rails?

A. It would have.

Q. Now when your jerk this tie what would happen to it with respect to the rail, you had about three-quarters of an inch higher than the tie, the rail was?

A. That is about as high as we raise it to pull the ties, all we need.

Q. That is with the ordinary tie?

[fol. 116] A. Yes.

Q. When you pulled on this tie what would happen to the tie with respect to the rail if anything?

A. As we raised on the tie without pulling the spikes?

Q. Well that isn't my question, when you jerked that tie did it lift the rail?

A. It come up against the rails yes.

Q. It wasn't free to come out?

A. That's right.

Q. Was there anything in that tie that you were pulling on?

A. We seen a spike when we got it out.

Q. How did you finally get it out, just by pulling it?

A. If I remember right, Buster Hopkins and I was

pulling, Dick was using the bar and prying over the rails, and I believe Bert Bailey used a maul and hammered as he hit we pulled.

Q. Now when you have a tie like that that you are having trouble getting out, how many men ordinarily work on it to pull it out?

Mr. Hocker: I think that is irrelevant, if Your Honor please.

Mr. Derrick: I think it is very pertinent, Your Honor.

The Court: Well you might question him further as to whether or not they ever had an experience of that kind before.

[fol. 117] Mr. Derrick: Yes.

Q. Did you ever have——

A. We have.

Q. Tell me with reference to the number of men that usually works on ties like that.

Mr. Hocker: The same objection, Your Honor.

The Court: I will overrule the objection.

By Mr. Derrick:

Q. Does one man try to get a tie like that out or does it take more than one man?

A. It usually takes two or three.

Q. I see. Who was the boss of the gang there, Mr. Fish?

A. Mr. Stoughton.

Q. Was he there present at the time this incident happened?

A. Yes sir.

Q. Was there another boss?

A. Yes sir.

Q. Who was he?

A. Mr. Slagle.

Q. Was he present at the time?

A. I don't think he was at the time, no.

Q. Do you know where he was?

A. No, I don't.

Q. How do you know that Stoughton was the boss, was [fol. 118] there anything that led you—tell us what you know about that?

A. Gene most generally tell us men what to do if he ain't around.

Q. Who did that?

A. Mr. Slagle. Mr. Slagle usually tells him to tell us men what to do when he ain't around.

Q. Does he always do that? Mr. Slagle do that?

A. Yes sir.

Q. Did you say that Mr. Slagle told Mr. Stoughton to tell the men what to do?

A. That's right.

Q. When he was gone. I didn't understand you clearly. Now have you ever heard Mr. Stone complain of his back after that incident?

A. I have.

Q. Will you tell us about that?

A. Well he kept, oh, I would say, he would keep feeling a little worse every day, complaining of his back and he got so when he would come to work his toes would hang down, and his foot there, he couldn't—I don't know what you would call it, he just couldn't work right.

Q. Did you ever hear him complain to Mr. Slagle?

A. I have.

Q. Do you have any idea how long that was after the accident?

[fol. 119] A. Oh, it wasn't so long after that.

Q. About how long did Mr. Stone work after this accident and injury?

A. Oh, I—just guessing at it I would say thirty days.

Q. Do you know whether or not, did you ever hear him ask Slagel or Stoughton to go to the doctor to send him to a doctor?

A. I have.

Q. Do you know when that was or where it was?

A. It was in front of the motor car house when we was getting ready to leave.

Q. Where is that located?

A. A little east of the junction.

Q. Did you ever hear Mr. Stoughton tell Mr. Prock Stone —did you ever hear Mr. Stonghton and Mr. Prock Stone have any words prior or after this occasion?

Mr. Hocker: I will object to that, Your Honor, as irrelevant. And calling for hearsay.

The Court: I will sustain the objection. I think it is too general, Mr. Derrick, if you want to call his attention to some particular conversation——

By Mr. Derrick:

Q. Did you ever hear Mr. Stoughton get onto Mr. Stone about the work he was doing prior to that?

Mr. Hocker: I will object to it on the same ground, and [fol. 120] also on the ground it is leading and suggestive, Your Honor.

Mr. Derrick: I will withdraw that.

Q. What was the relation if you know between Mr. Stone and Mr. Stoughton?

Mr. Hocker: The same objection, if Your Honor please, that calls for a conclusion also.

The Court: I will sustain the objection, Mr. Derrick, it certainly calls for a conclusion. I don't see that it is material.

Mr. Derrick: All right.

By Mr. Derrick:

Q. Did you ever hear any words between Stoughton and Stone prior to this occasion about the work?

Mr. Hocker: I will object to that as irrelevant, if Your Honor please, the issues as delineated by the petition which the plaintiff has filed here—this alleged conversation has nothing to do with the issues that are raised by the plaintiff's own petition.

Mr. Derrick: I think it has a bearing, Your Honor, the relation bears on the time he was ordered to jerk on that rail, it has a decided bearing on that, I submit.

The Court: I will sustain the objection, Mr. Derrick.

Mr. Derrick: All right, Your Honor.

[fol. 121] The Court: I don't see that it is material.

Mr. Derrick: Exceptions are saved as a matter of course.

The Court: Yes.

By Mr. Derrick:

Q. Now with respect to the jacking up of this rail, you said you had it about a quarter of an inch. You could have by pulling the spikes out of the ties near that, jacked that up high enough so that it would have been entirely free of the ground, could you not?

A. That's right.

Mr. Hocker: If Your Honor please, I ask that the jury be instructed to disregard the answer, because I wasn't given an opportunity to object.

The Court: I will sustain the objection and the jury will disregard the statement.

Mr. Hocker: The question is objectionable because it is leading and suggestive to put the answer in the witness's mouth, Your Honor.

The Court: In addition to that we have been over that, Mr. Derrick.

Mr. Derrick: I hadn't covered that sufficiently, Your Honor. I wanted to explain that a little further to the jury. It is merely to refresh his mind as to what he said so I could go on with another question.

[fol. 122] The Court: You may ask another question, if there is anything you want to clear up.

By Mr. Derrick:

Q. Why did you have to pull the spikes out of the ties near the one that you were going to pull out, Mr. Fish?

A. If we didn't it would raise the other ties too high and the dirt would get down under and make a hump in the track.

Q. What would you do then if you would just pull the spikes from the ties adjoining it?

A. Just raise the rail alone and let the ties where they belong.

Q. That would take a little more time would it not?

A. That's right.

Q. But it could be done and pull the tie out?

Mr. Hocker: I object to that it is the leading form of the question. The witness isn't testifying, it is the lawyer.

Mr. Derrick: I will withdraw it and reframe it.

By Mr. Derrick:

Q. I will ask you to state whether or not it would take more time by pulling those spikes?

A. It would.

Q. But it—I will ask you to state whether or not if you did pull the spikes, the track could be raised any height you wanted to?

[fol. 123] A. The rail could yes.

Q. By doing that, I will ask you to state whether or not that tie could have been pulled out by one man?

A. I would say it would have took two men to pull it out with the rails off of it to get it out from under there.

Q. Would you state whether or not that was because of the spike in it?

A. Well they most generally hook two men on them anyway.

Q. They generally hook two men on them?

A. That's right, when it is stuck that way.

Q. I believe I asked you this, if I did, I withdraw it. Have you ever seen any other ties with spikes in them?

A. I have.

Q. How do you generally handle that, a tie that won't come out that way because it has a spike in it?

A. You most generally dig a ditch alongside of it and deeper, kind of a V shape, and let that spike not hit anything.

Q. You would turn the tie over, is that it?

A. We could turn it sideways if the ditch is deep enough.

Q. Do you know why you didn't do that on this occasion?

Mr. Hocker: That calls for a conclusion, if Your Honor please.

The Court: I will sustain the objection.

[fol. 124] Mr. Derrick: I didn't hear what Your Honor said.

The Court: I sustained the objection.

Mr. Derrick: I think he is qualified to state about that, Your Honor.

The Court: Well it would still be a conclusion on his part.

Mr. Derrick: Well he is entitled to make a conclusion.

The Court: Isn't that a question for the jury to determine anyhow? Isn't that what we are trying here?

Mr. Derrick: I don't want to insist, Your Honor has ruled.

The Court: I will sustain the objection.

By Mr. Derrick:

Q. Could you have turned it over that way in this instance?

A. I don't believe we could on that tie, no sir.

Q. You couldn't?

A. No sir.

Q. When you finally got this tie out did you look at it or see it?

A. I did.

Q. Describe what you saw?

A. There was a spike sticking out the bottom of it, I should judge four inches long.

Mr. Derrick: I think that's all.

[fols. 125-133] Cross-examination.

[fol. 134] Charles Hopkins, a witness of lawful age produced on behalf of the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Derrick:

Q. State your name?

A. Charles Hopkins.

Q. Where do you live?

A. Claypool, Indiana.

Q. Can you hear back here?

(Juror in back row: Not very well.)

Mr. Derrick: Speak louder please.

A. Claypool, Indiana.

Q. How old are you?

A. Twenty-one.

Q. What has been your employment the past year or so?
A. Nickelplate Railroad.
Q. What was your job there?
A. Labor.
Q. Who was your boss?
A. Gene Slagle.
Q. Did you have a straw boss?
[fol. 135] A. Yes, Dick.
Q. What was his name?
A. Mr. Dick Stoughton.
Q. What was your—your duty was labor, you say?
A. Yes sir.
Q. Where were you working for the Nickelplate?
A. I was working at Argos.
Q. What work were you doing?
A. Well pulling out ties, straightening track, tamping it.
Q. You were then working on the section?
A. Yes.
Q. Who composed the crew, what was their names
A. Bob Demy, Gene Slagle, Dick Stoughton, me, Prock Stone and Lloyd Fish.
Q. Do you recall an incident when Mr. Stone worked on a tie that in pulling it out it had a spike in it?
A. Yes, I do.
Q. Where were you working with reference to him on that occasion?
A. Well I was working about twelve or fifteen feet away from him.
Q. Do you know about the time that this occasion happened?
A. I don't know exactly but it was in the spring some time.
[fol. 136] Q. In the spring some time?
A. Yes.
Q. Was that 1949?
A. Yes.
Q. Now will you tell in your own words what happened on that occasion?
A. Well I was cleaning out the place and putting new ties in, they was pulling them out, Mr. Prock and Mr. Fish.
Q. Tell where the other men were working too, if you can?

A. Well Bob Denny and Bert Bailey was spiking down behind me, I wouldn't say how far back, but Mr. Dick Stoughton was working with us.

Q. Where was Mr. Slagle?

A. Well I wouldn't—I think he went to the junction for something. I won't say what he went for.

Q. Speak louder will you please.

A. He went into the junction, I won't say what for, but he went in there, and they got to one tie where it wouldn't come out. Mr. Fish and Mr. Beck were pulling and Dick come up and started helping. He told Mr. Stone to pull harder. Mr. Stone told him he was pulling as hard as he could. Mr. Stoughton said, if you can't pull any harder I will get somebody that will, and they got down and Mr. Stoughton got a bar and started hitting it, trying to push [fol. 137] it out, to push the tie out, and it went on, and Mr. Stone got down, him and Mr. Fish and they pulled pretty hard on the tie and they jerked it. Mr. Stone stepped back off the tongs and raised up about half way and said, I hurt my back, and started walking up the track.

Q. Then what happened, what happened with reference to the tie?

A. Well me and Mr. Fish and two more fellows, I wouldn't know who they were right then, but we finally got the tie out and turned it over and there was a spike about five or six inches through.

Q. You say you got on the tongs?

A. Yes sir.

Q. And helped, did Mr. Stoughton continue to help?

A. Yes, he did.

Q. Do you remember the names of any of those other members of the crew that worked on it?

A. Bert Bailey might, I think he did, I wouldn't say for sure.

Q. Do you know what he was doing and what Mr. Stoughton was doing?

A. Mr. Stoughton I think had the bar, and Bert had the spike maul.

Q. What did he use the spike maul for?

[fol. 138] A. It is like a hammer, they drive spikes down. Looks like a big sledge hammer.

Q. How long had you been working on that section at that time?

A. Oh, I wouldn't say, but I had been working there two or three, months.

Q. Now after that did you ever hear Mr. Stone complain about his back?

A. Yes, I did.

Q. Will you tell about when that was?

A. Well he went backwards and forwards with me from Claypool and every time I would hit a bump he would tell me to slow down it hurt his back. Going backwards and forwards to work.

Q. How long did he ride back and forth to work with you after this accident occurred?

A. I wouldn't say, but about two weeks.

Q. What happened then, why didn't he ride any more with you?

A. Well he moved to Argos.

Q. Did you continue to work with him though after that?

A. Yes, I did.

Q. Did you ever hear him ask Mr. Slagle to send him to a doctor?

A. Yes sir.

Q. Tell about when that was if you know?

[fol. 139] A. Well I wouldn't know for certain, but it was in front of the car house one morning he asked him.

Q. Do you know whether he went to the doctor at that time or not?

A. No, I don't.

Q. Did you on any other occasion ever hear him tell Mr. Slagle that his back was bothering him and he wanted to go to a doctor?

A. Yes, I have.

Q. Now when Mr. Slagle was absent who was in charge of your gang?

A. Mr. Dick Stoughton.

Q. Were you told by anyone that he was to be in charge?

A. Well the boys tell me.

Q. Did Mr. Slagle say anything to you?

A. I don't remember.

Q. Now where with respect to the Y did this accident occur?

A. Well I would say about thirty feet from the junction, about pretty close to half way around the Y.

Q. Now explain that so the jury can tell. Was that the track that connects the two main tracks?

A. The two main tracks, yes sir.

Q. About how long was it if you can tell?

[fol. 140] A. Well I wouldn't—I would hate to say because I just don't know.

Q. Have you ever seen a tie with a spike in it that you had to pull before?

A. No, I never.

Q. You never did?

A. Never did.

Q. Did you ever see a tie where more than one man had to work on it?

A. Yes, I have.

Q. How did you get it out?

A. Well we would raise the track and dig around the side on the side of the tie and the fronf clear across.

Q. And how high would you raise the track?

A. Oh, about two to three inches.

Q. I see. Did you see the track, the rail on this occasion how high they were from the rails?

A. No, I don't think I did.

Q. Now could you have raised it, you had the spikes out, could you have raised the track high enough, the rails high enough, so that it would free that tie?

Mr. Hocker: That calls for a conclusion.

The Court: I will sustain the objection.

[fol. 141] By Mr. Derrick:

Q. How could you have raised the rails then high enough to free it?

A. Well you could have——

Mr. Hocker: Wait, excuse me. I object to that form of the question, because it is based on an assumption, the tie

was held by the rail, there is no evidence of that. The plaintiff's evidence and that of the plaintiff's witnesses show there was no rail on the tie.

Mr. Derrick: Why there is all kinds of evidence that the tie hit against the rail as it came up, Your Honor.

Mr. Hocker: That isn't the evidence, Your Honor, that the rail was holding the tie, that is where the question puts it.

Mr. Derrick: We don't say that, we say the spike was holding the tie.

Mr. Hocker: The question indicates otherwise.

The Court: Go ahead, answer the question.

A. Well you could lift the track back down, pull the spikes out about half a rail length forward, and then half back, and raise it up far enough to leave the tie come up and pull it out.

Q. Would that take a little more time?

A. Yes, it would.

Q. But the tie would then be free, would it?

A. Yes, the tie would be free.

[fols. 142-146] Q. Then how many men could pull it out?

A. Two.

Q. Your expenses have been paid down here have they not?

A. Yes sir.

Q. Has any arrangement been made or anything said to you about any time you lose from your work, or anything of that kind?

A. Yes sir.

Q. Did you ever see me before you came to St. Louis?

A. No sir.

Q. Did you ever see Mr. Carl Holderle before you came to St. Louis?

A. No sir.

Q. You saw some one who came up to talk to you though, didn't you?

A. Yes, I did.

Q. Do you remember who that was?

A. No, I don't.

Mr. Derrick: I see, all right, that's all.

Cross-examination:

[fol. 147] LLOYD FISH (recalled) having been heretofore duly sworn, on his oath testified further in behalf of plaintiff as follows:

Recross-examination.

By Mr. Hocker:

Q. Referring, Mr. Fish, to this statement that I showed you a while ago, I didn't ask you about the contents of it; but I want to know if this is substantially what—if this is what the statement said which you signed. Statement of Lloyd Fish on Plum Street, Argos, Indiana. I am thirty-six years old and am employed by the Nickelplate road as a track man on section number 76, under Foreman Slagle and have worked in this gang more than a year, that is my total service with the Nickelplate, is that right?

A. That was at that time.

Q. I remember one day last spring when we were dragging ties out from under the Y track some where near the fireman's building, Prock Stone made a remark, I will never pull that hard again. I was working with him that day helping pull the ties out, did you tell him that?

A. That's right.

[fol. 148] Q. I was working with him that day helping pull tie ties out, we had the rail jacked up and were dragging the ties out from under the rail. We were dragging them out to the north. Did you tell him that?

A. North rail, yes.

Q. The Y track is the northernmost track, there were no tracks to the north of us. We were using a pair of tie tongs to drag the ties out. Did you tell him that?

A. That's right.

Q. I was pulling on one handle, Mr. Stone on the other. We had pulled out quite a few ties together that day. Did you tell him that?

A. Yes.

Q. I don't know the exact day we were doing that, nor do I remember the exact time. But it seems to me it was in the afternoon when he made that statement, to me. Did you tell him that?

A. I did.

Q. At the time he said this I remember that this tie did pull hard, we turned it over to see what was holding it and found a spike sticking through the bottom of that, of the tie. Did you tell him that?

A. That's right.

[fol. 149] Q. It was on the far end, or south end of the tie about where it had been under the rail. Did you tell him that?

A. That's right.

Q. This often happens when a spike head is broken off and is driven on through with a plug, and a new spike put in. Did you tell him that?

A. That's right.

Q. It is nothing unusual to have a spike sticking through a tie. Did you tell him that?

A. That's right.

Q. He did not slip or fall, nothing struck him. The tie tongs did not slip or break. There is nothing defective about the tongs. Did you tell him that?

A. That's right.

Q. I was pulling just as hard as he was and there was no jerk or jar that I noticed. Did you tell him that?

A. That's right.

Q. He just said he would never pull that hard again. He did not at that time say his hip, back, leg, foot, arm or anything else hurt him. Did you tell him that?

A. Probably did at the time.

Q. He did not say he was hurt. I did not report to the foreman that he had made that remark. Did you tell him that?

[fol. 150] A. Right.

Q. As far as I know there was no injury. He kept on working at that time. Did you tell him that?

A. That is right.

Q. He also kept on working after that. I don't remember that he ever told me later on that he hurt himself at that time. Did you tell him that?

A. I probably did.

Q. It seems to me that Bert Bailey was there near us at the time he made the remark. Did you tell him that?

A. That's right.

Q. He just kept working that afternoon and as far as I know he did not report this to the foreman. Did you tell him that?

A. As far as I know.

Q. I don't know what he is off work for at this time, but I know he has not been working since some time in June: Did you tell him that?

A. That's right.

Q. This Y that we were working on is the north Y, it is the delivery track between the Nickelplate and the Lake Erie. Did you tell him that?

A. That's right.

Q. I have read this statement and it is correct, and that [fol. 151] last is in your handwriting, is that right?

A. That is right. Yes sir.

Mr. Hocker: That's all.

Redirect examination.

By Mr. Derrick:

Q. Mr. Fish, with respect to that statement were you working for the Nickelplate at that time you gave that statement?

A. That's right.

Q. Was there any reason why you didn't tell about the discussion between Stoughton and——

A. I didn't think it was——

Mr. Hocker: Wait just a minute: I will object to that, question, if Your Honor please, it assumes something that is not in evidence, and it is leading and suggestive.

Mr. Derrick: I don't know what it is assuming that is not in evidence.

The Court: I think I ruled out testimony or questions that you wanted to ask about discussion between the two men.

Mr. Derrick: No, I didn't ask him that, I asked him was there any reason why he didn't tell——

The Court: What is the question, I perhaps misunderstood the question?

[fol. 152] Mr. Derrick: I think this is what I stated: Was there any reason at the time you gave the statement why he didn't tell about the words between Stoughton and Stone.

The Court: Of course it assumes there were words. Oh, you mean just ordinary conversation?

Mr. Hocker: What he has related, Your Honor, I have no objection to that question.

The Court: All right, you may ask about the conversation that took place.

By Mr. Derrick:

Q. Why didn't you tell the man who took that statement and asked those questions about the statements made between Stone and Stoughton at the time Stone got hurt?

A. I didn't think it was necessary and if I had of it would probably have caused a little hard feelings between all of us.

Q. Is that the reason you didn't tell him?

A. That's right.

Mr. Derrick: That's all.

Recross-examination.

By Mr. Hocker:

Q. Just a moment, you don't remember or did you remember who it was—was it Mr. Derrick that came out to talk to you up in Argus about this case?

A. That I couldn't say.

[fols. 153-199] Q. You don't know. You don't know when it was that this person you can't identify came up and talked to you about the case with Mr. Stone?

A. No sir.

Q. You don't know?

A. I don't know.

Q. But in any event today you don't hesitate to tell about that conversation on account of any possible hard feelings, do you?

A. No sir.

Mr. Hocker: That's all.

Mr. Derrick: That's all.

(Witness excused.)

[fol. 200] Thereupon the court having duly admonished the jurors touching their conduct while court should not be in session declared a recess until one-forty-five P. M. the same day, April 4th, 1951. At which time the parties appeared, [fols. 201-209] court was duly reconvened and the following proceedings were had:

[fols. 210-213] PROCK STONE (recalled) the plaintiff having been heretofore duly sworn, on his oath testified further in his own behalf as follows:

[fol. 214] Redirect examination.

By Mr. Derrick:

Q. One more question, Mr. Stone, at the time just immediately prior to the time you jerked on this tie, and were injured, did you make any request, I will ask you to state whether or not you made any request to Mr. Stoughton to jack up the track any more?

Mr. Hocker: If Your Honor please, I think this is repetition.

Mr. Derrick: I did not ask him that, that is the very purpose I am asking this.

The Court: All right, if you didn't ask the question, I thought he had been over it.

Mr. Derrick: No, he hasn't, another witness did, but this one hasn't.

The Court: All right, go ahead.

A. Would you ask me that question again please?

By Mr. Derrick:

Q. Did you make any request to jack up the track higher to Mr. Stoughton?

A. Yes sir, I did, I asked him to jack the track up.

Mr. Derrick: That's all.

Recross-examination.

By Mr. Hocker:

Q. Just one comment more. With reference to the examinations of Doctor Moore and Doctor Hampton copies of [fol. 215] their report were sent to you and to your lawyer, weren't they?

A. No, I didn't have any copies.

Q. Well they were sent to your lawyer weren't they?

A. I don't know that.

Q. You don't know that?

A. No.

Mr. Hocker: There is no doubt about that is there, Mr. Derrick?

Mr. Derrick: There is certainly no doubt about it, but that is very improper, Your Honor, and I move the jury be instructed to disregard that sort of stuff as improper.

Mr. Hocker: I can prove the fact if you want me to.

Mr. Derrick: I told you it is true.

A. I went to the doctors, that's all I know.

Mr. Hocker: That's all.

Mr. Derrick: That's all.

(Witness excused.)

Mr. Derrick: That is the plaintiff's case, Your Honor. And that was all the evidence offered and heard on the part of the plaintiff in chief on the issues herein joined.

[fol. 216] Motion for a Directed Verdict and Denial Thereof

At the close of the plaintiff's evidence the defendant moves the court to instruct the jury to return a verdict in its favor, and for grounds of its motion states that the evidence fails to disclose substantial evidence of negligence proximately causing plaintiff's injuries upon which the court could grant the relief sought by the plaintiff.

Which said motion for directed verdict so filed by defendant at the close of plaintiff's case in chief, was by the Court

refused. To which action in refusing said motion for directed verdict, defendant by its counsel, duly excepts.

Defendant's Evidence in Chief

The defendant then to sustain the issues on its part introduced the following evidence:

ROBERT DENNY, a witness of lawful age produced on behalf of the defendant being first duly sworn on his oath testified as follows:

Direct examination.

By Mr. Hocker:

Q. Will you state your name please?
A. Robert Denny.
Q. Where do you live, Mr. Denny?
[fol. 217] A. Argos, Indiana.
Q. By whom are you employed?
A. Nickelplate railroad.
Q. How long have you been so employed by the Nickelplate?
A. Four years.
Q. What type of work do you do for the Nickelplate?
A. Track work.
Q. Were you doing that type of work in the spring of 1949?
A. Yes.
Q. Where was—what section were you working with, Mr. Denny?
A. Working on the Argos section.
Q. Will you tell us who was on that section gang, is that what you call them?
A. Yes.
Q. Section crew, I should say.
A. Eugene Slagle.
Q. Yes?
A. Dick Stoughton.
Q. Yes?
A. Lloyd Fish.
Q. Yes?

A. Prock Stone.

Q. Yes?

A. Charles Hopkins.

[fol. 218] Q. Yes?

A. Bert Bailey and myself.

Q. That's all, they were all the people in the crew. Do you remember an occasion some time in the spring of 1949, when the crew was removing some old ties from the north Y track at the junction at Argos, Indiana?

A. I do.

Q. Do you remember any occasion when Prock Stone strained himself doing that work?

A. Not that I recall.

Q. Did he ever say anything to you about having strained himself or injure his back in any way?

A. Yes, he did.

Q. When was that, Mr. Denny?

A. It was some time later after he had went to a doctor.

Q. Do you know the occasion when he went to a doctor?

A. Well——

Q. I don't mean the day, but just tell the circumstances under which he went to the doctor?

A. One morning he came down to work and ask the foreman for some kind of paper to go see a company doctor. Mr. Slagle had to go home and get it.

[fol. 219] Q. He asked Mr. Slagle in your presence about it?

A. Yes.

Q. Was that the first occasion that you knew that he had had an injury or strain or something of the sort?

A. That is.

Q. Did Mr. Slagle attempt to get such a slip?

A. I think that he did, yes.

Q. Prior to that time as far as you know, as far as you were able to observe was Mr. Stone doing regular work as part of a section crew?

A. Yes.

Q. After that time was there any difference in the type of work he did?

A. He did light work for a few days.

Q. And after a few days what happened?
A. He didn't work any more.

Mr. Hooker: You may inquire.

Cross-examination.

By Mr. Derrick:

Q. Mr. Denny, who brought you down here?
A. The representative of the railroad.
Q. Your expenses are paid by them?
A. That is right.
[fol. 220] Q. And your wages will be paid while you are away?
A. According to the union contract, yes.
Q. And you say your expenses are being paid here by the railroad company?
A. That is right.
Q. You say you don't remember anything about when this accident occurred?
A. I remember about them talking about it, yes.
Q. Weren't you working right near when it happened?
A. That is right.
Q. Don't you remember pulling the tie out, having trouble jerking the tie?
A. I remember removing ties.
Q. Do you remember this particular tie, this time when they had trouble removing a tie that had a spike in it?
A. I believe I do.
Q. Would that refresh your memory?
A. No, it wouldn't refresh my memory.
Q. Don't you remember that on this Y that when they were pulling ties out, that Prock Stone and Lloyd Fish were working together, jerking the ties?
A. Well they were working together, I don't know about jerking the ties.
Q. You didn't see them jerking on the ties?
[fol. 221] A. I possibly didn't.
Q. What is that, sir, I didn't understand you?
A. I possibly didn't see them.
Q. You possibly didn't, what do you mean by that?

A. Well I was working a little ways away.

Q. About how far away were you?

A. Possibly a rail length.

Q. How far is that in feet?

A. Maybe thirty feet. Thirty-five.

Q. Do you remember hearing Stone say anything about his back bothering him, that he hurt his back? After that complaining on the job?

A. Not until he went to the doctor.

Q. How long was that after you saw them pulling the ties?

A. Well——

Mr. Hocker: Wait a minute. There is no evidence that he saw him pulling the ties.

By Mr. Derrick:

Q. Didn't you previously say you saw him pulling the ties out that had a spike in it?

A. What is that?

Q. I say didn't you tell me a moment ago that you saw a tie with a spike in it that Stone and Fish pulled out from under the rails?

[fol. 222] A. Well I saw them pulling ties out.

Q. Did you see one that had a spike in it, that they pulled out?

A. Yes, I saw one with a spike in it.

Q. Do you remember about when that was?

A. No, I don't know the time.

Q. Well would about May 2nd, be about the time?

A. I couldn't say.

Q. Wasn't it about a month—do you remember when Prock Stone quit work for the railroad?

A. Well as I recall it was in June.

Q. What was your answer?

A. As I recall it was in June after he didn't work any more.

Q. After he didn't work any more. I didn't hear you, I am sorry.

A. As I recall it was in June.

Q. When he quit?

A. Yes.

Q. And this tie that you saw that had a spike in it, did you see that about a month prior to that time, something like that?

A. I couldn't say as to the date or time.

Q. I didn't ask you the date, was it approximately a month or something like that?

A. It might have been.

[fol. 223] Q. Did you ever see Prock Stone doing light work? After that, after that tie was pulled out with the spike in it?

A. Yes.

Q. Do you know why he was doing light work?

A. Well after he had come back from the doctor he was doing some light work.

Q. Now this—do you remember whether this tie that Fish and Prock was pulling on would not come out, do you remember them having any trouble pulling it out?

A. Well I don't remember if they did or not.

Q. Don't you remember that he was pulling on it and you saw that it wouldn't come out, don't you remember that?

A. I don't believe I do.

Q. You don't. Do you remember talking to Mr. Holderle and giving him a statement?

A. Is Mr. Holderle the gentleman back of you?

Q. Yes.

A. I believe I do, that is him.

Q. I will ask you whether or not this is your signature?

A. Yes.

Q. And do you notice where it says, I have read the above and it is correct, do you remember that?

A. Yes.

[fol. 224] Q. I will ask you whether or not you told Mr. Holderle this: My name is Robert Denny, and I work for the Nickelplate railroad. I work on a section. Is that correct?

A. That is right.

Q. I was working on the second, last year when Prock got hurt, I remember when he was hurt, but I don't know the date. Do you remember telling him that?

A. I possibly did.

Q. We were working on the Y near the junction at Argos, I was working on the gang. Do you remember that?

A. Yes.

Q. We were taking out old ties and putting in new ones. Prock Stone, Dict Stoughton, Buster Hopkins, Bert Bailey and Lloyd Fish were in the gang that day with me. Do you remember that?

A. Yes.

Q. Prock was pulling out ties. There was a spike down through the tie he was trying to pull out and it wouldn't come out. Do you remember that?

A. Yes.

Q. You say, I don't remember who was pulling with Prock. Do you remember telling him that?

A. Yes.

Q. We were all working within thirty or forty feet of [fol. 225] each other. Do you remember that?

A. Yes.

Q. That is correct isn't it?

A. Yes.

Q. I saw him pulling on the tie and saw that it wouldn't come out. Do you remember that?

A. I suppose I do, sir.

Q. Well that is a fact isn't it.

A. Yes.

Q. I don't recall hearing anyone say anything to him about how to do the work. Do you remember that?

A. Yes.

Q. I don't know whether I was close enough to hear Prock and the man he was working with or not. Do you remember that?

A. Yes.

Q. I don't know what caused Prock to get hurt. Do you remember that?

The Court: Answer out loud so the reporter can get your answer.

A. Yes.

By Mr. Derrick:

Q. This has happened over a year ago, but I do know that he hurt his back. I don't remember seeing him get hurt,

I don't remember. Do you remember telling Mr. Holderle that?

[fol. 226] A. Yes.

Q. I heard him complain about his back after he was hurt. I don't know how long he complained after he was hurt, but I do know that he complained about hurting his back and about not being able to work. Do you remember that?

A. Yes.

Q. Finally they put him on light work, painting switches when he couldn't do the regular work. Do you remember that?

A. Yes.

Q. And that is a fact isn't it?

A. Yes.

Q. I don't remember whether he ever asked for light work or not. I don't remember about Prock asking to go to the doctor, but I do remember Mr. Slagle gave him a paper to go to the doctor. Do you remember that?

A. Yes.

Q. And that is a fact?

A. Yes.

Q. I remember many a morning when Prock came to work and complained about being stiff in his back and his back hurting, but I don't believe I was ever present when he asked Slagle to send him to the doctor. Do you remember that?

A. Yes.

[fol. 227] Q. Is that true or not?

A. Yes.

Q. I do remember that one morning Slagle did take a slip to Prock. I don't know the date though. Do you remember that, do you remember that time?

A. Yes.

Q. About all I do remember is that Prock was hurt pulling that tie out and I heard him complaining about his back after that. Do you remember that?

A. Yes.

Q. Is that a fact?

A. Yes.

Q. He walked around for some time after that, perhaps a month. Do you remember that?

A. Yes.

Q. Is that a fact?

The Court: Answer out loud.

A. Yes.

Q. Finally they put him on painting switches and that was about the last work that he did. Do you remember that?

A. Yes.

Q. Now that is about all I know, all I can remember. This happened a long time ago and I wasn't working with him when he was hurt. I was in the gang, but I was a little distance away. I have read the above and it is correct.

[fol. 228] A. Yes.

Q. Then you were mistaken just a few minutes ago when you said you never heard him complain, weren't you? When you told Mr. Hocker that on direct examination?

A. Well I don't know whether that was after he went to the doctor.

Q. Well would that make any difference?

A. No, it wouldn't make any difference.

Mr. Hocker: It would make a difference as to whether there was any contradiction.

By Mr. Derrick:

Q. Well you heard him complain numerous times didn't you?

A. That is right.

Q. That was before Slagle gave him the slip wasn't it?

A. I don't recall whether it was or not.

Q. Well you know when he got the slip and went to the doctor he quit work don't you?

A. A few days after that.

Q. Well you heard him complain many times before that, didn't you?

A. That's right.

Q. Then you were mistaken when you told Mr. Hocker you never heard anything about it until he got the slip to go to

[fol. 229] the doctor?

A. That is right.

Q. Can you explain how you were mistaken about that?

A. I don't know whether I can unless I didn't recall.

Q. You just didn't recall?
A. Yes.

Mr. Derrick: That's all.

Redirect examination.

By Mr. Hocker:

Q. Let me see that, Mr. Derrick. Where did Mr. Holderle see you, Mr. Denny, do you recall?
A. In my home at Argus.
Q. As I understand—if I understand you correctly you did not see Stone get hurt?
A. No.
Q. And so far as you know he made no complaint that you overheard?
A. No.
Q. About being hurt at the time, is that right?
A. No.
Q. But subsequent to that time he did complain about pain in the back, is that right.
A. That is right.
[fol. 230] Q. As I understand you——

Mr. Derrick: That is leading and suggestive, Mr. Hocker.
Mr. Hocker: All right, OK. I will withdraw it.

By Mr. Hocker:

Q. Can you tell me whether or not you now recall whether the complaints that he made about the pain in his back was before or after he asked Slagle or Slagle gave him a slip to go to the doctor?
A. Well I can't recall, I suppose it was around the time that he went to the doctor.
Mr. Hocker: All right, that's all.

Recross-examination.

By Mr. Derrick:

Q. You just got through telling me a moment ago that you heard him before he got the slip to go to the doctor, didn't you?

A. It might have been a few days before.

Q. But you have said here that you heard him complain a number of times about his back, now isn't that a fact that you did hear him complain a number of times about his back?

A. I heard him complain about his back, I don't know how many times.

Q. Well over what period of time did that occur?

A. I couldn't say.

Q. Well was it a week, two weeks, a month or how long?

[fol. 231] A. It might have been a week.

Q. Mr. Denny, was there any reason why you couldn't remember this statement and the things you told Mr. Holderle?

Mr. Hocker: What is the question?

By Mr. Derrick:

Q. Was there any reason why he cannot remember that he made the statement to Mr. Holderle?

Mr. Hocker: If Your Honor please, that assumes that he can't remember, as I understand it he has stated that he does remember the statement.

The Court: I will sustain the objection.

By Mr. Derrick:

Q. All right, do you remember telling Mr. Lloyd Fish just a few days ago when he came to your house and you told him that you were coming down here, if you opened up and told the whole truth you might loose your job, do you remember saying that?

A. No.

Q. What did you say if anything?

A. I said that we were coming down to St. Louis.

Q. Did you say anything about what you were going to testify to, or anything at all about it?

A. Not that I recall.

Q. Well could you be mistaken about it, will you say you didn't or you just don't remember?

[fol. 232] A. Be mistaken about what?

Q. About saying that to Lloyd Fish?

A. I never said that.

Q. You didn't say anything like that at all?
A. No.
Q. You did not?
A. No.
Q. You did not say that if you opened up and told the truth your job wouldn't last very long?
A. I didn't say that.
Q. You didn't say that?
A. No.

Mr. Derrick: That's all.

Redirect examination.

By Mr. Hocker:

Q. Now let's find out about that, Mr. Denny. Has anybody with the Nickelplate ever told you to tell anything——

Mr. Derrick: Now I object to that if the Court please. That is improper.

Mr. Hocker: No, it isn't improper in view of the interrogation and the insinuation that has been made here.

Mr. Derrick: I didn't make any insinuation, I merely asked this witness whether he said that or not. To lay the [fol. 233] foundation for impeachment. That is all. Mr. Hocker knows that. That is improper cross examination. It is impeaching his own witness.

Mr. Hocker: I am not impeaching my own witness. I want to know what the facts are, Your Honor.

Mr. Derrick: This is not the place to find out here.

Mr. Hocker: Well I think it is.

Mr. Derrick: Well I will object to it.

The Court: You might change your question somewhat.

Mr. Hocker: All right.

By Mr. Hocker:

Q. Do you belong to any union?
A. I did belong to the Brotherhood.
Q. Do you not belong to the Brotherhood now?
A. I don't now, no.
Q. Are you working pursuant to a union contract, is your employment under a union contract?

A. That is right.

Q. Are the terms of your employment governed by the terms of the union contract?

Mr. Derrick: If the Court please, I object, that is immaterial, has no bearing on the issues in this case.

The Court: Well it might, in view of the testimony [fol. 234] brought out before.

Mr. Derrick: All right.

The Court: About him looseing his job.

By Mr. Hocker:

Q. Is there anything, Mr. Denny, that you know about this accident that you haven't told me and that you haven't told the Claim Agent?

A. No.

Q. Well if there is I want to know what it is, Mr. Denny, is there anything about this accident that you know that you haven't told?

A. There isn't.

Mr. Derrick: Is that all?

Mr. Hocker: That's all.

Recross-examination.

By Mr. Derrick:

Q. Just a moment, Mr. Denny, have you heard Mr. Stoughton get on Prock Stone at any time about his work?

A. No, I haven't.

Q. You never did, not once?

A. Well not that I recall, no.

Q. Not that you recall?

A. That is right.

Q. Did you hear him get on anybody else?

[fol. 235] A. Well what do you mean get on them?

Q. Well you know what I mean, holler at them about their work, telling them how to do their work?

A. I have heard him give them instructions how to do their work.

Q. Did you ever hear him have any argument with Prock Stone?

A. No.
Q. You did not?
A. No.
Q. Are you sure of that, Mr. Denny?
A. Not that I remember, no.
Q. Not that you remember?
A. That's right.

Mr. Derrick: I believe that's all.
Mr. Hocker: That is all, Mr. Denny.

(Witness excused.)

LLOYD FISH, a witness of lawful age produced on behalf of the defendant, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Hocker:

Q. Did you hear the question Mr. Derrick just asked Mr. Denny about something that he was supposed to have said to you in Argos?
[fol. 236] A. Yes sir.
Q. Tell me about that, Mr. Fish?
A. Well I went up—he stopped at the mill that morning and wanted to see me. I wasn't there so I went back up to his house that evening.
Q. How do you know he stopped there and asked for you, tell me, some one told you?
A. The boys told me he was there.
Q. So you went by his house that evening?
A. Yes, I went up after supper and talked to him, to see what he wanted. At that time I wasn't figuring on coming to St. Louis. He told me that if he went down here and talked his job wouldn't be worth a nickel.
Q. He told you what, say it again?
A. He told me if he would go down there and talk, told the truth he wouldn't have a job.
Q. Is that all he told you?
A. Yes sir.
Q. Did you ask him what he meant by that?

A. I knew.
Q. You knew?
A. Yes sir.
Q. Well tell us about it?
[fol. 237] A. Well they will finally lay him off.
Q. How?
A. They will finally lay him off.
Q. Finally, what I am getting at is what is he supposed to know. Did you ask him what he knew that he wasn't going to tell?
A. No. I didn't know that.
Q. What?
A. I didn't know that. He was working with us.
Q. Why didn't you know at that time, Mr. Fish, that you were coming to St. Louis?
A. Because I didn't have no way to get down here, and I wasn't fixed to leave.
Q. After that time were arrangements made?
A. That is right.
Q. After that time you got a letter?

Mr. Derrick: Now if the Court please, he is assuming the right of cross examination of the witness, and he is calling him as his own witness.
Mr. Hocker: He is the plaintiff's witness, Your Honor.
Mr. Derrick: Now if the Court please, he knows better than that.
Mr. Hocker: Well I object to the comment made by Mr. Derrick, if Your Honor please as to whether I know better [fol. 238] than that. That is up to His Honor to say, and not for Mr. Derrick.
Mr. Derrick: Well I assumed you would, Mr. Hocker, I think every lawyer knows that.
The Court: Just a moment, wasn't that covered before, the last question you asked, wasn't that asked the witness before?
Mr. Derrick: Yes it was, Your Honor.
The Court: I think it was covered, Mr. Hocker.

By Mr. Hocker:

Q. This is the entire conversation now, his statement his job wouldn't be worth a nickel if he went down and talked, is that what he said?

Mr. Derrick: If the Court please, I am objecting to the form of the question because this is his witness. He has made him his witness and he has no right to ask him leading and suggestive questions, nor cross examine him.

The Court: I don't think this is cross examination it is a question of getting clear just what was said.

Mr. Derrick: Well I will object, there is a proper way to do it, Your Honor.

The Court: I will overrule the objection. You may answer.

A. What is the last?

The Court: You had better read the question.

[fol. 239] (Question read by the reporter.)

Mr. Hocker: Well I will withdraw it, put it this way. Tell us what it was Denny is supposed to have said to you. When was this?

A. Before we come down here.
Q. When?
A. I don't know what the date of it was.
Q. What?
A. I don't know what the date of it was.
Q. How long ago was it?
A. Oh, I would say a week ago.
Q. At Denny's house?
A. Yes sir.
Q. Was anybody else there?
A. His wife and family was there.
Q. His wife and family?
A. Yes sir.
Q. Who was his family?
A. How was that?
Q. Who was in the family?
A. That I can't name.
Q. Well were there older children among them?
A. His children was there, yes.

[fol. 240] Q. How old is the oldest child?
A. I couldn't tell you that.
Q. They live in Argos do they?
A. That is right.
Q. Tell us what he is supposed to have said to you?

Mr. Derrick: Well that is repetition, that is about five times he has asked him that question.
Mr. Hocker: Well I want to know what it is.
Mr. Derrick: I think you know. I object to it on the ground it is repetition.
The Court: Maybe the jury hasn't just got it right, I will overrule the objection. He may state again.

A. He said if he talked his job wouldn't be worth a nickel.
Q. If he talked his job wouldn't be wor*ht* a nickel?
A. That's right.
Mr. Hocker: You may inquire.

Cross-examination.

By Mr. Derrick:

Q. Mr. Fish, do you know now who it was who came to Indiana and talked to you about this case?
A. You mean the Claim Agent for the Nickelplate?
Q. Well yes, tell me who it was who talked to you there?
A. That I couldn't say.
[fol. 241] Q. You don't know the Claim Agent's name?
A. No sir.
Q. You were working for the railroad at the time you gave that statement?
A. That is right.
Q. You knew at the time that there had been difficulty between Stone and Stoughton?
A. That's right.

Mr. Hocker: I object to the leading form of the question.
Mr. Derrick: I am cross examining the witness. I have a right to do it.
Mr. Hocker: This is plaintiff's witness he put on.
Mr. Derrick: Now if the Court please, I think you ought to rule on that. This is a witness that he has called himself.

Mr. Hocker: This is not cross examination of anything I asked him about.

Mr. Derrick: I can cross examine him about anything.

The Court: I don't think so.

Mr. Derrick: I don't want to argue with the Court, but I can furnish authorities if you want to see them.

The Court: I think you can only cross examine him on anything that he asked him about after he called him.

Mr. Derrick: That is a Federal rule, the State rule is you [fol. 242] can go—well I will abide by Your Honor's ruling. I don't want to argue with you, but I think that is the Federal rule but not the State rule.

The Court: I will sustain the objection.

Mr. Derrick: All right. What was the question before the objection? I got lost.

(Question read by the reporter.)

By Mr. Derrick:

Q. Had there been any trouble between Stoughton and Stone prior to this time, he pulled this tie?

A. I beg your pardon?

Q. Had there been any argument or trouble between Stoughton and Stone prior to the time that you pulled this tie?

A. Any trouble between Stone and who?

Q. And Stoughton, Dick Stoughton, the boss?

A. They was arguing.

Q. You say you didn't tell the Claim Agent about that?

A. No sir.

Q. Now tell me why you didn't tell the Claim Agent?

Mr. Hocker: Now that question was asked him before and he answered it, Your Honor, this is certainly repetition.

The Court: I will sustain the objection.

Mr. Derrick: I didn't ask him that.

Mr. Hocker: Yes you did.

[fol. 243] Mr. Derrick: I did not. I submit I didn't. The jury knows that.

The Court: I think it is repetition. I think we have been all over it.

Mr. Derrick: Well I am going to save my record on this, Your Honor, because I know I am right on it.

(Thereupon the following occurred at the bench out of the hearing of the jury:

Mr. Derrick: I offer to prove by this witness if he is permitted to testify that he can tell of several instances where Mr. Stoughton got on Mr. Stone and told him about the way he was working. That he frequently bawled him out, told him to do this or that or the other thing in a way and in a manner that angered Stone and I will further state that this witness, Mr. Fish, has been called as a witness by the defendant and I have the right to cross examine him, I think I am entitled to that right.

The Court: As I recall I sustained an objection to that question when he was examined in chief. When he was on the stand you asked him.

Mr. Derrick: Yes I did, but now I am entitled to cross examine him.

The Court: I have already ruled, Mr. Derrick that you can only cross examine on certain things as defendant's [fol. 244] attorney may bring out.

Mr. Hocker: Let me object also to the offer of proof, Your Honor, as it is not within the purview of the question, and the history of the previous incident has nothing to do with the questions asked, the question asked is, why didn't you tell the Claim Agent, and that question was asked the witness and the witness answered because he didn't think it was important, as I recall his answer. Anyhow he answered it.

The Court: Do you object to the offer of proof?

Mr. Hocker: Yes, sir.

The Court: I will sustain the objection.

(Thereupon the trial on the issues was resumed before the jury and the following proceedings were had:

Mr. Derrick: That's all.

Mr. Hocker: That's all.

(Witness excused.)

Richard Stoughton, a witness of lawful age produced on behalf of the defendant, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Hocker:

Q. Will you please state your name?
A. Richard Stoughton.
Q. Where do you live, Mr. Stoughton?
A. Argos, Indiana.

[fol. 245] Q. I notice you are wearing a beard, Mr. Stoughton, can you tell us what is the circumstances of that?

Mr. Derrick: Well that is immaterial. He wants to, I guess. I object to it.

The Court: All right, I will sustain the objection.

Mr. Hocker: I want to show——

Mr. Derrick: I am going to object——

By Mr. Hocker:

Q. What is hap-ening in Argos, Indiana, Mr. Stoughton?

Mr. Derrick: Object to that for the same reason, because it is attempting to evade the Court's ruling.

The Court: I don't know what you want to bring out.

By Mr. Hocker:

Q. How big a town is Argos, Indiana, Mr. Stoughton?
A. It is around twelve or fourteen hundred.
Q. When was it founded, do you know?
A. One hundred years ago.
Q. One hundred years ago. Are you going to have a celebration?

Mr. Derrick: I am going to object, if the Court please, it is highly immaterial and the Court has ruled on it.

Mr. Hooker: All right, I will withdraw the question.

[fol. 246] By Mr. Hocker:

Q. By whom are you employed, Mr. Stoughton?
A. Nickelplate railroad.

Q. How long have you worked for them?
A. Nine years.
Q. What type of work have you been doing?
A. Working as a track man.
Q. On the section. What section of the track have you been working on?
A. Well up until February the 1st, 1951, I was working on section 76 at Argos.
Q. At Argos. Were you working on section 76 at Argos in the spring of 1949?
A. Yes sir.
Q. Tell us who was in that crew at that time?
A. Well Mr. Slagle,——
Q. Slagle is the foreman?——
A. Yes.
Q. Who else?
A. Myself as first man.
Q. Yes?
A. Mr. Denny.
Q. Yes?
A. Mr. Stone.
[fol. 247] Q. Yes?
A. Mr. Fish.
Q. All right?
A. Mr. Hopkins.
Q. Yes?
A. And Mr. Bailey.
Q. Now among those people outside of Slagle who had the most seniority? At that time?
A. I did, sir.
Q. And as such were you designated as first man of the crew?
A. Yes sir.
Q. Were you paid at the same wage rates as the other people in your crew?
A. I got two cents more on the hour.
Q. Two cents more on the hour. When Mr. Slagle was away did you have any authority to instruct, to direct the manner in which the work was being done by the track crew?

Mr. Derrick: If the Court please, the form of that question is bad. It is objectionable, proving agency by the agent.

Mr. Hocker: Do you deny it?

Mr. Derrick: No. But I am objecting to the form of the question, that is not the proper way to do it.

[fol. 248] The Court: Well of course it may be leading, I think that is right, Mr. Hocker.

Mr. Hocker: All right.

By Mr. Hocker:

Q. When the foreman was away from the crew who directed the manner in which the work was being done by the crew, Mr. Stoughton?

A. Well, sir, the only time I was there just to see, instruct them how to do things was all I was supposed to do.

Q. You say you instructed them how to do things?

A. Yes sir.

Q. Now did you have any authority with respect to the employment of the men or discharge of the men who were working there?

A. No sir.

Mr. Derrick: Object to that, the form of the question, and move that the answer be stricken. It is leading and suggestive.

Mr. Hocker: Well I have asked the question straight out. I am not suggesting anything, whether or not he had such authority.

Mr. Derrick: You suggested the answer.

Mr. Hocker: Which answer did I suggest?

Mr. Derrick: Oh, go ahead and save time.

By Mr. Hocker:

Q. How long is that section, Mr. Stoughton?

A. It was approximately six miles.

Q. What in general were the duties of the section crew?

[fol. 249] A. Well clean right-of-way, put in new ties.

Q. Did it also include certain things—when you say clear the right-of-way, what do you mean by that?

Q. Well, mowing, mowing right-of-way, burning right-of-way.

Q. In case of snow did you have any duties?

A. Yes sir, we had a yard, we had to keep the switches clean.

Q. In connection with ballast, did you have any duties?

A. Well the only time was when we was on full lift, that was raising the track complete.

Q. I see. Now what is the north Y, there has been some talk about the north Y here, Mr. Stoughton?

A. Well the track that runs from the Nickelplate railroad around to the Lake Erie for delivery of cars from each road.

Q. Does the Lake Erie main line and Nickelplate main line cross approximately at right angles?

A. Approximately, yes sir.

Q. And the Y track ties those two tracks together?

A. Yes sir.

Q. Do you remember in the spring of 1949, whether or not your section crew at any time removed some old ties on that Y track?

A. Yes sir.

Q. What is the method of removing ties when you do that?

A. Well, sir, in a place like that that is under ballast [fol. 250] we have to take and dig a trench at the end of the tie and dig out in between what we call the crib, that is in between the ties. You have to dig down below the ties.

Q. Yes?

A. Then the fellow that is pulling the ties they come along and remove the spike and the plate, they have to jack it up after they remove the spikes and take the plates out.

Q. What is the purpose of jacking up the track?

A. To relieve the pressure on the tie. The track is sitting on the ties. There is too much pressure to remove the plates.

Q. What is a plate, maybe we don't know what the plate is?

A. Well it is a metal, a square piece of metal that has a shoulder on and there is four square holes in it and the

rail sets on top of that and that is placed on top of the tie in between the tie and the rails.

Q. Is that spiked then to the tie, that plate?

A. Yes sir.

Q. Tell us what happens after you have jacked up the rail or before you jack up the rail, is it necessary to pull the spikes?

A. Yes sir.

Q. Then you said you jacked up the rail. Then what is done?

A. Well it is slid over into this trench.

Q. I mean with respect to the tie plate. What is done with that?

[fol. 251] A. The tie plate is knocked off from the tie.

Q. That is the jacking up of the tie of the rail, does that have anything to do with loosening the tie plate?

A. No sir. Sometimes they are caught into the ties half or three-quarters of an inch and you will have to take them, take a maul or bar or something and knock them plates off your ties.

Q. They are sort of counter sunk or set into the ties, is that it?

A. Yes sir.

Q. How far is the rail raised up?

A. Just enough to release the pressure; so that the pressure can be taken off of the tie.

Q. What is done after the plate is taken out from under the rail on top of the tie?

A. Well the tie is slid over into the trench that is deeper, from a half an inch deeper than what the tie is, then it is pulled out from under the track.

Q. How is it pulled out?

A. You have these tongs you can hook on and two men, there is usually always two men working together pulling ties.

Q. Is that made like an ice tongs with a fulcrum in the middle?

A. Yes sir.

[fol. 252] Do you remember an occasion up there on the north Y where there was a spike that kept a tie driven through, that kept a tie from being pulled out?

A. There were two or three occasions that we had

trouble getting ties out that had spikes driven through them.

Q. Do you remember any occasion that such a thing happened and complaint was made by Prock Stone about his back at the time?

A. No sir, I don't.

Q. When was the first time that you learned that Prock Stone had made complaint about his back being hurt?

A. The morning that he came down to Mr. Slagle and ask- him for a permit to go to the doctor.

Q. Do you remember when that was?

A. No sir, if I remember right it was some time in June.

Q. Tell us about what you noticed or what you observed about that occasion?

A. Well, I didn't notice anything too particular about it, because at the time that he came down there the rest of us was putting the motor car onto the track.

Q. I see. After that time did you notice what Prock Stone was doing or what he did?

A. Well after he came back from the doctor, Mr. Slagle gave him some oil to oil the switches where the oiler didn't hit the rail.

[fol. 253] Q. Prior to that time, did Mr. Stone—did you observe anything unusual about the manner in which Mr. Stone did his work?

A. No sir, I didn't.

Q. Did you ever, do you recall, ever having said on any occasion to Stone, if you can't pull on that tongs harder I will get somebody on there who can?

A. No sir, I didn't.

Mr. Hocker: You may inquire.

Cross-examination.

By Mr. Derrick:

Q. Can you say that you didn't say that to him on this occasion?

A. Yes sir.

Q. Did you ever say that to him on any other occasion?

A. No sir, I didn't.

Q. Did you ever have occasion to get on him about his work at any time?

A. It wasn't my place to get onto anybody.

Q. I didn't ask you that. I asked you if you did, not if it was your place?

A. No sir.

Q. You never did?

A. No sir.

[fol. 254] Q. Did you ever have any trouble with him at all?

A. Well we had an argument one morning over—there is a car knocker's shanty there, it was raining the day before and he had poured some ashes in the coal bucket in there and the car knocker bawled me out about it, and I told him about it the next morning.

Q. I see. You say you don't remember—well I will withdraw that. You say there were two or three occasions where you had ties with spikes in them?

A. Yes sir.

Q. Was that on this north Y?

A. Yes sir.

Q. Was that about the time that Prock Stone got hurt?

A. Well if he was hurt there it was.

Q. If he was hurt there?

A. Yes sir.

Q. You don't know where he was hurt?

A. I do not know where he was hurt.

Q. You don't know a thing in the world about it?

A. No sir.

Q. Do you remember any time when you were jacking up the rail and he and Fish were pulling together on the rail?

A. No, they have been working together all the time we [fol. 255] was working on the north Y.

Q. Do you remember an occasion where he asked you to jack the rail up a little higher?

A. Three or four occasions.

Q. There was several occasions when he asked you to jack it up higher?

A. Yes sir.

Q. Do you remember one time any argument you had

before—Mr. Fish jerked on the tie and they had trouble getting it out?

A. No sir, I don't.

Q. You don't remember?

A. No sir.

Q. Let me ask you this, could you have jacked the ties up higher in order to get the ties out?

A. Well sir, if you jack them up too high dirt will get under the ties and it will make the track awful rough.

Q. Make a hump in it, is that right?

A. Yes sir.

Q. That is because you pull the ties up with the rails?

A. Yes sir.

Q. Couldn't you loosen the spikes a few ties down and lift the rail free of the ties?

A. Well sir, a place like that it is impractical because [fol. 256] the train is coming and going there all the time and they use that Y so much, that don't leave it safe and the trains can't get across and you have to put out a flag.

Q. You mean you have to stop the trains?

A. Yes sir.

Q. But it could be done that way?

A. It could be done.

Q. And it would be safer where you are trying to pull a tie out that is hard to pull?

A. No sir, it would take a lot longer.

Q. Well I know it would, but it would be a lot safer, wouldn't it?

A. Yes sir.

Q. Now on this occasion where you had two or three spikes did two men pull that out or more than one?

A. Well sir, I helped on a couple of them.

Q. You helped on a couple?

A. Yes sir.

Q. And it took three of you to get them out or four?

A. It took three or four to get them out.

Q. Three or four to get them out?

A. Yes sir.

Q. That was because the spikes stick down in the ground [fol. 257] and holds the tie?

A. Yes sir.

Q. And you can't raise it up because the rails aren't high enough up off of the ties, is that right?

A. Yes sir.

Q. Do you know about the time that there was two or three ties that had spikes in them that were taken out about the date?

A. No sir, I don't.

Q. Would it be on or about, is that April?

Mr. Hocker: He said May 2nd, in the petition.

By Mr. Derrick:

Q. On or about the 2nd day of May, some time around that time?

A. The only thing I remember it was in the spring of the year.

Q. The spring of the year?

A. Yes sir.

Q. You don't remember the date?

A. No sir.

Q. And two men without some help from somebody on the end prying and somebody else can't pull one of those ties out with the spike in them, can they?

A. No, it is awful hard.

Q. Do you remember Mr. Holderle talking to you about this, don't you?

[fol. 258] A. No sir, I remember Prock coming down there with some gentlemen.

Q. Prock?

A. Mr. Stone.

Q. This is your signature isn't it?

A. Yes sir.

Q. Do you remember this, I have read the above and it is correct, do you remember that?

A. Yes sir.

Q. I will ask you whether or not you told Mr. Holderle this. I do remember that four men finally worked on that tie to get it out. I don't know who the men were, in fact they were three or four ties that they had trouble with. I remember one tie that had a spike driven through it. Do you remember telling him that, sir?

A. Yes sir.

Q. Do you remember that now?

A. Yes sir.

Q. Do you remember anything about whether that is the one Mr. Stone got hurt on?

A. No sir, I couldn't tell you that was the one or not.

Q. You couldn't tell whether it was that one or some other one?

A. Yes sir.

Mr. Derrick: That's all.

[fol. 259] Redirect examination.

By Mr. Hocker:

Q. Let me see that, Mr. Derrick. Now with respect to the rest of this statement that was exactly what you told us here. You told Mr. Holderle the same thing you told this Court?

A. Yes sir.

Mr. Derrick: Let's see if he did. I will go over this.

By Mr. Hocker:

Q. You never knew that Prock Stone was injured until he asked for the slip to go to the doctor, is that right?

A. That is right.

Q. That is the first you knew about it?

A. Yes sir.

Mr. Hocker: That's all.

Recross examination.

By Mr. Derrick:

Q. Just a minute. Do you remember all that is contained in this statement, do you?

A. Not to the word, sir.

Q. You substantially remember, you said yourself, you said it was all exact, if it is I will let it go?

A. I believe I do, sir.

Q. But you didn't remember when you were testifying on

[fol. 260] direct examination about the four men who had to pull the tie out at that time?

[fol. 261] A. Well sir, there was three or four that took more than two men to pull that out.

Mr. Derrick: He said he didn't remember that on direct examination. You didn't remember that did you?

Mr. Hocker: That is for the jury if Your Honor please.

The Court: I think it is a matter for the jury to determine.

Mr. Derrick: All right, that is all.

Mr. Hocker: That is all, Mr. Stoughton.

(Witness excused.)

EUGENE SLAGEL, a witness of lawful age produced on behalf of the defendant, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Hocker:

Q. State your name, Mr. Slagle.

A. Eugene Slagle.

Q. Where do you live, Mr. Slagle?

A. Argus, Indiana.

Q. What is your occupation?

[fol. 262] A. Section foreman.

Q. By whom are you employed?

A. Nickelplate Railroad.

Q. What section do you have charge of, Mr. Slagle?

A. Section 76 at Argus.

Q. Did you hear Mr. Denny testify just a minute ago?

A. Yes sir.

Q. Did you hear Mr. Fish testify just a minute or so after that?

A. Yes sir.

Q. Have you said anything to Mr. Denny, Mr. Slagel relative to his loosing his job if he testified one way or the other?

Mr. Derrick: Now if the Court please, that is highly improper and prejudicial, that is absolutely improper and I am going to object to it.

Mr. Hocker: All right, if you object to the question, I will withdraw the question.

By Mr. Hocker:

Q. Do you have Mr. Denny in your crew now?

A. Yes sir.

Q. Who was in your crew in the spring of 1949, Mr. Slagle.

A. Richard Stoughton, Bert Bailey, Robert Denny, Lloyd Fish, and Charles Hopkins.

Q. Did you make any record in connection with your duties [fol. 263] as section foreman, Mr. Slagel? To determine where the crew was working on any particular time?

A. Yes sir, I make a daily, cover all the work we do during that day.

Q. Can you tell me, Mr. Slagel, do you have here such records with you that would show where you were working in the spring of 1949?

A. Yes sir.

Q. Do you remember in the spring of 1949, whether or not your crew, your section crew, at any time worked on the track on the north Y track, between the Lake Erie and the main line track?

A. Yes sir, we worked half a day on March the 30th, all day on March 31st, and about two or three hours in the forenoon of April the 1st.

Q. Where were you working on May 2nd, Mr. Slagel?

A. I would have to look that up. I don't remember.

Q. All right, give us a week on either side of April 2nd while you are at it, or I meant May 2nd?

A. On May 2nd, we were working west of Argus about two miles and a quarter.

Q. How far would that be from the north Y?

A. Two miles and a quarter. The north Y is at the junction where the mile post is, that is where we figure from, the junction.

[fol. 264] Q. Can you give us a few days each side, we will say a week before May 2nd, where were you working the preceeding week?

A. On the 23rd we were working four miles west of Argus, no, that is the 3rd. On the 4th, we were working three miles west of Argus. On the 5th we were working about half a

mile east of Argus, and we unloaded a few grain doors at the station. On the 6th we cleaned out a ditch east of Argus, 7th, the same job. On the 9th of August we cut down the trees——

Q. 9th of April you said 9th of August.

A. 9th of May, excuse me.

Q. Is this the 9th of May you are talking about?

A. Yes.

Q. I am not so much interested in that as the last part of April. Can you tell us about the earlier part of April, say the last week in April. Take from the middle of April and come on down?

A. The first of May we worked on the main tracks, that is west of the railroad crossing on the main track. On the 2nd of May we worked on the transfer track.

Q. I am primarily interested in the last couple of weeks of April and May, the 2nd of May you were working——

A. This is April.

Q. Oh, this is April, all right.

[fol. 265] A. The 1st of April we worked eight man hours on the north Y.

Q. All right.

A. That is a little over an hours time. We figure one man one hour, one man hour for each man who works on a job.

Q. You have eight men in the crew?

A. Let's see, there were six men besides me, myself, I think.

Q. That is all together.

A. That would be a little over one hour put in, putting in ties, and ten man hours, that would be about an hour and a half that we were putting on double shoulder tie plates.

Q. Double shoulder what?

A. Tie plates.

Q. Tie plates?

A. When we put in these ties we have some men taking out old ties and throwing in new, and we have some men back pulling out the spikes, picking out single shoulder tie plates and putting in double shoulder tie plates. The single shoulder has about that much outside, and the double shoulder has about that much, about an inch inside, about that much on both sides, the double shoulder. So that the rails can't move either way.

Q. That was on the 1st of April, is that right?

A. That is the 1st of April.

Q. Did you go back to the north Y at any time after the [fol. 266] 1st of April?

A. No sir.

Q. Do you keep your records showing what time any individual was in your crew?

A. I have a semi-monthly time book.

Q. A semi-monthly time book?

A. That is sent in on the last day of the half, that is the 15th and the last day of the month, that is sent in, and that is where they figure the pay for each man.

Q. Do you have here with you the time records of your crew for April and May of 1949?

A. Yes sir.

Q. Semi-monthly time report I guess you would call that. I am interested in the time report for the middle of April and the end of April and the middle of May and end of May. I would like to know how much time Prock Stone was missing from his employment?

Mr. Derrick: Now if the Court please, he can use those records to refresh his recollection, I have no objection to that, but the records themselves of course is no evidence. They are not admissible.

Mr. Hocker: I believe they are admissible. I will offer them right now.

Mr. Derrick: I will make an objection.

[fol. 267] Mr. Hocker: OK.

Mr. Derrick: I don't mind his refreshing his recollection about it.

The Court: I take it that is what he is doing, refreshing his recollection.

Mr. Derrick: That is why I made no objection, Your Honor.

The Court: All right.

Mr. Derrick: Right now he is beginning to talk about what his record show.

Mr. Hocker: Well all right, we will go at it both ways. Let's start off with refreshing your recollection, if you please, Mr. Slagel, by referring to those records. You can refer to them for the month of April and the month of May.

in 1949, and tell me whether or not Prock Stone missed any. —or how much time if any he missed from his employment during those two months?

A. He worked practically every day in April and May. He was off one day around May 14th when he moved from Claypool to Argus. And he was off half a day, he and Hopkins drove, that was the first part of May, the 4th, I think, Hopkins was supposed to drive and he didn't show up and so Mr. Stone came with me. He worked a half day that day. And he wasn't off any more that I remember of until May 31st.

Q. What happened on May 31st?

[fol. 268] A. He didn't come out May the 31st, but the 1st of June he come out and said he had hurt himself.

Q. Where were you at that time when he came out?

A. I was at the car house just ready to start the car.

Q. Had you ever heard him complain of his back, that he hurt himself or suffered an injury prior to that time, Mr. Slagel?

A. No sir.

Q. What was the conversation as far as you recall it between you and him at that time?

A. I asked him where he hurt himself, and he said he hurt himself putting in ties at the Michigan Street crossing.

Q. Where is the Michigan Street crossing?

A. That is the main street that goes through Argus, that is about approximately a thousand feet west of the Argus junction.

Q. What did you do then after that conversation?

A. I went home, naturally, made out the injury report and made out a slip for him to go to the doctor.

Q. How far was your home from the place where this conversation took place?

A. About three-quarters of a mile.

Q. Then when you came back did you have any other conversation with him?

A. When I came back he took the slip—I took the slip over [fol. 269] for him to go to the doctor and I told him he couldn't possibly have hurt himself on the Michigan Street crossing because we didn't pull out any ties then. I was thinking about it on the way back. We changed a rail there,

took the rail out to bring the ties up and put them up in shape, we didn't take any out so he couldn't have been hurt there. Then he changed it and said it was down on the north Y.

Q. When were you working on the Michigan Street crossing?

A. April the 11th and 12th, April 11th, we went to work in the crossing.

Q. On this occasion you took out a rail and then lifted the ties out with the rail?

A. We changed several rails, took out ninety pound rails put in a hundred and ten and put new ties in the crossing.

Q. Tell me, Mr. Slagel, had you ever on any previous occasion been told by Mr. Stone that he had hurt himself in any way during those two months April and May of 1949?

A. No sir.

Q. Are these the work reports for April and May?

A. Yes sir. There is the first half of April.

Q. This is the——

A. The last one is the last half of April.

Mr. Hocker: The first of May and the last half of May, [fol. 270] all right. I will take the first of June then.

Mr. Hocker: I will have a little more with this witness, Your Honor.

The Court: All right, suppose we take our recess then.

(Temporary recess.)

By Mr. Hocker:

Q. Refreshing your memory, your recollection if you care to by looking at these time records for the first two weeks in June, that is the first half of the month of June, tell me what you can about the days that Stone worked in June of '49?

A. Let's see it was the 2nd of June he come back and asked me if he could do some work where there wouldn't be any lifting, he wanted to work. I told him we had to oil some rails, to switches, he could take a paint brush and paint that on, he could do that. He said he had to go to the doctor anyway. I told him to take that oil and paint those rails. He had to go to the doctor every other day. On the 3rd and 4th of June, then the 5th was Sunday, then he worked the

6th and 7th, that was Monday and Tuesday. Tuesday evening when he came in he said, the doctor told him that he would have to stay off of his leg, and I told him not to work any more and he didn't work any more at all.

Q. That is the last day he worked?

A. Yes.

[fol. 271] Q. That was the last day he worked?

A. That was the last he worked.

Mr. Hocker: You may inquire.

Cross-examination.

By Mr. Derrick:

Q. Do you know anything about the tie that they had difficulty with, Mr. Slagel?

A. I heard them say that one pulled out pretty hard is all. I didn't see them when they were pulling on it.

Q. You were away at the junction, you call that the junction house, the junction do you, that house over there?

A. I wasn't in the junction very much, I went in a few times a day to find out about trains that were going to use that Y. We had to keep it safe. I wasn't gone very long at a time, I was back and forth because the men were putting on double shoulder tie plates and gauging the rail and the ones up ahead were digging out the ties.

Q. To your best recollection when was that?

A. That was the last day of March.

Q. Last day of March. Were you at the Y on Michigan Street when Mr. Stone first told you he got hurt?

A. He didn't tell me.

Q. I said at the Michigan Street crossing, was that where [fol. 272] you were when he told you he got hurt the first time?

A. No, we were there at the car house.

Q. Oh, you were at the car house?

A. That was in the morning.

Q. Were you working on Michigan Streett that day?

A. No, the first time he told me anything about being hurt was the 1st of June, we were at the car house.

Q. Where had you been working or where were you going to work that day, do you recall?

A. The 1st of June?

Q. Yes?

A. We were working west of Argus.

Q. West of Argus?

A. Yes.

Q. Do you know what time you were at the Michigan Street crossing?

A. We worked on the Michigan Street crossing April 11th.

Q. April 11th?

A. 11th and 12th.

Q. You were pulling out ties there, I believe, or digging ties out?

A. We took the rail out and just dug the ties up and throwed or carried them away.

[fol. 273] Q. Carried them away, you did take ties out and put new ties in on that Y?

A. Yes sir.

Q. Have you had any occasion when you had a spike through a tie and had to pull that out in your experience?

A. A few times, very seldom.

Q. Very seldom. How many men does it take to pull them out ordinarily?

A. Well they don't know they are in there till they get the tie out. If they pull hard I have always told them to push it back over and dig their trench deeper.

Q. If they pull it out it takes more than two men, it takes three or four men does it?

A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, it would drop down lower and then they could pull it out easy.

Q. If they knew the spike was there they would do that, wouldn't they?

A. They knew something was holding it or it wouldn't pull so hard.

Q. With a spike in it when you are jerking it out and you raise it hits the top of the rail as it comes up, doesn't it?

A. That's right.

[fol. 274] Q. And of course if you jack the track up higher?

A. The rail.

Q. If you jack the rail up higher it would come free?

A. If you jack it up too high the ballast will run under the other ties and you get a hump in the track.

Q. And to avoid that you pull the spikes out of the ties that are close to this one wouldn't you?

A. That would be very foolish to do that, because they could just move the tie back and dig the trench deeper.

Q. Well it could be done that way?

A. I wouldn't think anybody would do it that way.

Q. Would it be more expensive?

A. It would be a hard job if you had to pull the spikes out of the ties, it would be very foolish to do that.

Mr. Hocker: I am sorry, I didn't get your statement, Mr. Slagel.

A. If you pull the spikes out each way to raise that rail up you would have to plug the holes and respike it all. If you didn't the spikes would work right back out, if they are pulled on, it would be very foolish to go to all that work just to get the rail up when you could dig the trench deeper and take the tie out that way. That would be much easier.

By Mr. Derrick:

Q. Do you always dig a trench by the tie, or do some of [fol. 275] them come out without it?

A. Dig a trench by the tie and knock the tie over into the trench.

Q. Is that when they have a spike or something holding them?

A. No, if there is something holding and couldn't be pulled out they knock it back over and dig the trench deeper.

Q. But in all cases, that is what I am getting at, do you dig a trench by the tie?

A. Yes sir.

Q. In all cases you do that?

A. Yes sir.

Q. But you don't know how it happened at this time that they had trouble getting this particular tie out?

A. No, I know we had some men digging out the trenches and some pulling on ties, but I didn't know this had a spike in it until after they got it out.

Q. Did you see the spike?

A. No, I didn't look at it.

Q. You didn't look at it. How do you know there was a spike in there?

A. I heard them talking about it.

Q. Heard them talk about it?

A. Yes.

[fol. 276] Q. That day was it the same day or——

A. Yes sir.

Q. Do you have any record of when that was?

A. It would have to be one of those three days, possibly March 31st; because we only worked half a day on the 30th, and just a couple of hours the 1st of April.

Q. Did you hear any conversation about more than one spike or was there just the one?

A. One is all I heard. It is very seldom you ever have one, we haven't had over three since I have been foreman.

Q. About three since you have been foreman, and how long is that?

A. Eleven years and a half.

Q. Who is taking your place while you are gone, Mr. Slagel, anybody?

A. I wasn't gone at that time.

Q. No, I mean now, while you are down here?

A. There is another man takes my place.

Q. You are still employed by the railroad?

A. What?

Q. You are still employed by the Nickelplate railroad?

A. That's right.

Q. You expect to be paid, do you?

[fol. 277] A. Yes sir, we have a union agreement to that effect.

Q. And your pay goes on while you are down here, you get paid by the company for the time you are off?

A. Yes sir.

Q. I will ask you whether or not you know whether Mr. Stoughton's expenses are paid to come down here and whether he is being paid his wages while he is away?

A. We have a union agreement to that effect. They must be paid.

Mr. Derrick: I think that's all.

Redirect examination.

By Mr. Hocker:

Q. Let me ask you this. Can you tell us whether or not the union agreement controls the condition of employment of any member of the section crew whether or not he belongs to the union?

Mr. Derrick: Well if the Court please, the agreement is the best evidence. I didn't ask him anything about that. He just merely brought it out.

The Court: Very well, I will sustain the objection, if you object to it.

Mr. Hocker: I believe that is all.

Mr. Derrick: That is all.

(Witness excused).

[fol. 278] Mr. Hocker: That is the defendant's case, Your Honor.

The Court: Is there any rebuttal testimony?

Mr. Derrick: I don't think so. May I take a couple of minutes here?

The Court: Yes.

Mr. Derrick: That's all.

The Court: I will let the jury go at this time. We can go over the instructions and give them the case the first thing in the morning.

Mr. Hocker: If Your Honor please I would like to send these witnesses back if we may do so. Do I understand that the evidence is now all in?

Mr. Derrick: Yes, as far as I am concerned it is. They can go.

The Court: Very well, that may be the understanding.

Thereupon the Court having first duly admonished the jurors touching their conduct while court should not be in session declared an adjournment until the following day, April the 5th, 1951 at ten o'clock A. M. At which time court was duly reconvened the parties appeared and the following proceedings were had:

[fol. 279] MOTION FOR A DIRECTED VERDICT AND DENIAL THEREOF

At the close of all the evidence the defendant moves the Court to instruct the jury to return a verdict in its favor, and for grounds of its motion states that the evidence fails to disclose substantial evidence of negligence proximately causing plaintiff's injuries upon which the Court could grant the relief sought by the plaintiff.

Which said motion for a directed verdict so filed by the defendant at the close of the whole case, was by the Court refused. To which action in refusing said motion for a directed verdict, defendant by its counsel duly excepts.

OBJECTIONS TO INSTRUCTIONS AND THE RULINGS THEREON

After full discussion in chambers and out of the hearing of the jury the following proceedings were had in chambers:

Mr. Hocker: Defendant objects to instruction number 1, and instruction number 9, and defendant also objects to the Court's refusal to give instruction number A offered by the defendant.

Mr. Derrick: The plaintiff objects to the Court's giving and reading to the jury instructions number 2, 3, 4, 5, 6, 7 and 8.

[fol. 280] INSTRUCTIONS GIVEN

At the request of the respective counsel for the parties and of its own motion the Court gave and read to the jury the following instructions, over the objections of the respective counsel as heretofore indicated:

Instruction Number 1

The Court instructs you that the plaintiff was employed by the defendant at the time in question, and that both the plaintiff and the defendant were engaged in Interstate Commerce.

The Court instructs the jury that if you find and believe from the evidence that at the time and place mentioned in the evidence, the plaintiff was engaged in removing ties from the railroad tracks of the defendant, and if you fur-

ther find that in doing so the plaintiff was acting within the scope and course of his employment, and if you further find that the plaintiff was being directed in the performance of the work and operation which he was then doing by the defendant, its agent and servant, and if you further find and believe from the evidence that the plaintiff was being assisted by a fellow servant in the work then being performed, if you so find, and if you further find and believe from the evidence that an iron spike had been driven through said tie in such a manner as to make it unsafe for the plaintiff and said fellow servant to remove the tie from [fol. 281] the track in the usual, customary and ordinary manner, if you so find, and if you find and believe from the evidence that the plaintiff and his fellow servant were exerting sufficient strength and were pulling on the tie sufficiently hard to remove a tie under ordinary circumstances, then if you find and believe from the evidence that the defendant, through its agent and servant, ordered and directed the plaintiff to exert more strength and to jerk said tie hard enough to remove it, if you so find, and if you further find and believe from the evidence that the order, or direction, if any, by said defendant, its agent and servant, amounted to a direction to the plaintiff to exert more strength than was ordinarily necessary and customary to remove a railroad tie under ordinary and customary circumstances, if you so find, and if you find and believe from the evidence that the plaintiff and his fellow servant were then and there exerting sufficient strength and were jerking hard enough to loosen and remove a railroad tie under ordinary circumsfances, and that such fact, if it be a fact, was known to the defendant, its agent and servant, or by the exercise of ordinary care would have been known to it, and if you further find and believe from the evidence, under the circumstances then and there existing that the said defendant, its agent and servant, was negligent in giving such order or direction, if you find the [fol. 282] order or direction was given, and that the plaintiff was injured as a direct and proximate result of said negligence, then your verdict will be for the plaintiff and against the defendant.

You are further instructed that if you find and believe from the evidence that the railroad tie mentioned in evi-

dence could not safely be removed by two men, by pulling on said tie, with the means and appliances provided by the defendant, and if you further find and believe from the evidence that the defendant, its agent and servant, knew or by the exercise of ordinary care would have known that two men could not safely remove the tie in question with the means and appliances furnished by it, and if you further find that said tie could have been removed with additional help, with safety to the plaintiff, then you are instructed that it was the duty of the defendant, its agent and servant, to have furnished the plaintiff with additional men to help remove said tie, and you are further instructed that the failure of the defendant to furnish additional men, if so, was negligence, under the circumstances then and there existing.

You are further instructed that if you find and believe from the evidence that the rails could have been jacked up high enough at the place in question, so as to free said tie mentioned in evidence, and the spike therein, and if you [fol. 283] further find and believe from the evidence that this would have enabled plaintiff and his fellow servant to remove said tie, without the necessity of exerting more strength than was ordinarily and customarily used in removing a tie, if you find they did exert more strength than was ordinarily and customarily used, and if you further find and believe from the evidence that by removing the tie after jacking up the rails and freeing the tie and spike, if you find it could have been freed, was a safer way to remove said tie than the method of jerking and prying on the said tie to loosen and remove it, if you find they did jerk and pry on said tie in order to remove it, without jacking the rails sufficiently high to free the tie, and if you further find and believe from the evidence that by the exercise of ordinary care, the defendant, its agent and servant, would have known of the safer way of removing said tie, if it was safer, then you are instructed that the defendant's failure to use the safer way of removing the said tie, if you find it was safer and the defendant failed to use it, if you so find, was negligence, and you may so find even though you may find and believe from the evidence that it was more difficult and burdensome to the defendant to jack the rails up high enough to free the said tie and the spike therein.

You are, therefore, instructed that if you find and believe [fol. 284] from the evidence that the defendant was negligent in any respect mentioned in this instruction, and that the plaintiff was injured as a direct and proximate result of such negligence, if any, in whole or in part, if you so find, then your verdict will be for the plaintiff and against the defendant.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 2

The Court instructs the jury that in order for an injury to have been directly and proximately caused by negligence as this phrase is used in the instructions, it is necessary that you find that an ordinary prudent person, situated as was the defendant, would have anticipated that some injury would result from the action or omission claimed to be negligence. Therefore even though you may find that the defendant acted or failed to act in some manner defined and set out in Instruction No. 1, nevertheless, unless you also find that an ordinary prudent person, situated as was the defendant, would have anticipated that some injury would result from such action or failure, your verdict should be for the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

[fol. 285] Instruction Number 3

The Court instructs the jury that if the plaintiff was not injured in pulling on the tie in question your verdict should be for the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 4

The Court instructs the jury that if you find that the defendant's "first man", Stoughton, did not order the plaintiff to pull harder on the tie, then your verdict should be in favor of the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 5

The Court instructs the jury that even though you find that the defendant's "first man", Stoughton, did order the plaintiff to pull harder on the tie, if you further find that the defendant's first man, in the exercise of ordinary care, would not have anticipated that the plaintiff would pull so hard thereon as to injure himself in response to that order, then your finding on the issue of whether defendant gave plaintiff a negligent order should be in favor of the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

[fol. 286] Instruction Number 6

The Court instructs the jury that the defendant had the right to assume that the plaintiff was a reasonably healthy and strong individual, capable of performing the duties of an ordinary section hand, and that he would act as an ordinary reasonable and prudent person. If you find that the defendant could not have anticipated that the plaintiff would exert himself beyond the limits of his strength in response to the order given, if any, then the defendant was not negligent in giving the order and the plaintiff cannot recover on this issue, and your finding on it should be in favor of the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 7

The Court instructs the jury that on the issue of whether or not the defendant was guilty of negligence proximately causing the plaintiff's injuries, the burden of proof rests upon the plaintiff to prove to your reasonable satisfaction by the greater weight, that is, the preponderance, of the credible evidence, that the defendant was guilty of negligence in the respects set out in the other instructions. If the proof on this issue preponderates in favor of the defendant, or if it is evenly balanced, your verdict should

[fol. 287] be in favor of the defendant and against the plaintiff.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 8

The Court instructs the jury that:

Even though you find from the greater weight of the credible evidence that the defendant gave the plaintiff the alleged order to pull harder on the tongs, and that the defendant knew or should have known that such order was reasonably likely to cause plaintiff to injure himself; and that defendant was negligent in so doing, nevertheless

If you also find and believe from the evidence that plaintiff exerted his utmost strength to pull and jerk on the tongs, when he knew or by the exercise of ordinary care should have known that to do so was reasonably likely to cause injury to himself, then you are instructed that plaintiff was guilty of contributory negligence.

And if you so find that he was himself guilty of contributory negligence, then the damages to which he might otherwise be entitled shall be diminished by the jury in proportion to the amount of such negligence, if any, attributable to him.

Given 4/5/51.

Wm. S. Connor, Judge.

[fol. 288] Instruction Number 9

The Court instructs the jury that if under the evidence and the other instructions given you, you find the issues in favor of the plaintiff, you should assess his damages, if any, at such sum as you believe from the evidence will fairly and reasonably compensate him pecuniarily for said injuries and damages, if any, and in arriving at the amount you may take into consideration:

First, such pain and suffering of body and mind, if any, plaintiff has suffered by reason of and on account of his injuries, if any, suffered on the occasion in question.

Second, such pain and suffering of body and mind, if any, plaintiff is reasonably certain to suffer in the future by reason and on account of his injuries, if any, suffered on the occasion in question.

Third, such loss of earnings, if any, plaintiff has suffered by reason and on account of his injuries, if any, suffered on the occasion in question.

Fourth, such loss of earnings in the future, if any, plaintiff is reasonably certain to suffer by reason and on account of his injuries, if any, suffered on the occasion in question.

You are further instructed that in connection with such [fol. 289] damages, if any, the law does not afford you any standard of measurement more accurate than that given you above, but in connection therewith and all the evidence relating thereto you are permitted to take into consideration your common knowledge and experience in life except that you cannot award plaintiff more than he has sued for in the petition.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Number 10

The Court instructs the Jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the Jury, in which event all of the Jurors who concur in such verdict shall sign the same.

If, however, all of the Jurors concur in a verdict, your foreman alone may sign it.

Given 4/5/51.

Wm. S. Connor, Judge.

Instruction Refused

And the Court also refused to give instruction number A offered by the defendant.

[fol. 290] Instruction Number A

The Court instructs the jury that you may in no event award the plaintiff any damages on account of a ruptured

intervertebral disc, damage to the left peroneal nerve or a dropped left foot.

Refused 4/5/51.

Wm. S. Connor, Judge.

VERDICT

And thereafter, towit: on the 5th day of April, 1951, the jury returned a verdict in said cause, which verdict is in words and figures as follows:

(Caption omitted)

We, the Jury in the above cause, find in favor of the Plaintiff on the issues herein joined and assess his damages at the sum of Sixty Thousand and no/100 Dollars.

——— ———, Foreman.

Frank A. Brandt, Edwin A. Kuehner, Sarah Jessup, John E. Dougherty, Charles J. Wensler, D. J. Nichols, R. W. Schultz, Dave Glazier, Lennie Edmonson.

[fol. 291] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

JUDGMENT

Upon said verdict being returned into open court by the jury, judgment was rendered in said cause in favor of the plaintiff and against the defendant as the same now appears of record in the records of the Circuit Court of the City of St. Louis, Missouri, and is in words and figures as follows:

"Now at this day this cause again coming on for hearing come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein. Whereupon by leave of Court first had and obtained so to do, plaintiff amends his petition by interlineation on page 3, paragraph 7D, to read as follows:

"In that the defendant failed to jack up the rails to enable said tie to be pulled out in a safer way, then plaintiff was required to remove the tie."

Thereupon the further trial of this cause is resumed and progresses before the Court and at the close of all the evi-

dence defendant presents to the Court its motion for a directed verdict, and the Court having seen and examined and duly considered the same and being sufficiently advised thereof, doth order that said motion be overruled and filed, and the trial of this cause being terminated the same is submitted to the jury and the jurors aforesaid, upon their oath as aforesaid say:

[fol. 292] 'We, the Jury in the above cause, find in favor of the Plaintiff on the issues herein joined and assess his damages at the sum of Sixty Thousand and No/100 Dollars ($60,000.00).

——— ———, Foreman.

Frank A. Brandt, Edwin A. Kuehner, Sarah Jessup, John E. Dougherty, Charles J. Wensler, D. J. Nichols, R. W. Schultz, Dave Glazier, Lennie Edmonson.'

And the jury being polled the jurors aforesaid as having signed said verdict say they concur; and the three remaining jurors to-wit: Frederick Harsch, Herbert Schmidt and Harry A. Nienhause say they do not concur.

Wherefore it is considered and adjudged by the court that the plaintiff have and recover of the defendant the sum of Sixty Thousand Dollars ($60,000.00) together with costs of this proceeding and let execution issue therefor.

Jury polled, verdict and instructions filed.

[fol. 293] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

MOTION FOR JUDGMENT, OR, IN THE ALTERNATIVE FOR A NEW TRIAL—Filed April 9, 1951

(A)

Comes now the defendant in the above cause and moves the Court to render judgment in favor of the defendant in accordance with its motion for a directed verdict, and for grounds of its motion states that at the trial there was adduced insufficient evidence to make out a claim upon which relief can be granted.

(B)

In the alternative, and in the event the Court fails to sustain defendant's motion for judgment, defendant moves the Court to grant it a new trial of the above cause, and for grounds of its motion states:

[fol. 294] 1. The Court erred in failing to sustain the defendant's motion for a directed verdict at the close of all the evidence on the grounds that the evidence failed to disclose substantial evidence of negligence proximately causing the plaintiff's injuries.

2. The verdict was against the weight of the evidence.

3. The verdict was excessive.

4. The verdict was the result of bias and prejudice in favor of the plaintiff and against the defendant as evidenced by the size of the verdict and by the question and comments of one of the jurors at the time of submission.

5. The Court erred in admitting evidence incompetent, irrelevant and immaterial testimony offered on the part of the plaintiff.

6. The Court erred in excluding competent and relevant evidence offered by the defendant.

7. The Court erred in giving and reading to the jury each of the instructions offered by the plaintiff and given by the Court.

8. The Court erred in refusing to give to the jury each instruction offered by the defendant and so refused.

9. The Court erred in giving and reading to the jury Instruction No. 1, which instruction was erroneous, among [fol. 295] other reasons, on the following accounts:

(a) It was a comment on the evidence;

(b) it hypothesized facts not in evidence;

(c) it declared as a matter of law, certain acts to constitute negligence without the necessary finding that the jury so consider them;

(d) it submitted disjunctive findings of negligence and authorized recovery under any of the disjunctive findings, but without finding sufficient facts under each of the alternative hypotheses to constitute separate findings of negligence;

(e) it declared as a matter of law that it was negligent

of the defendant to direct the plaintiff to exert more strength and to fail to provide additional help and to jack up the rails further than was disclosed by the evidence.

10. The Court erred in giving and reading to the jury plaintiff's Instruction No. 9, which, among other reasons, was erroneous because it referred to the amount sued for in the petition.

11. The Court erred in refusing instruction lettered "A" offered by the defendant, thereby permitting the jury to award damages on account of disability as to which there was no evidence that it resulted from the occurrence in question.

12. The verdict was so large that it could only have been [fol. 296] based upon a compensatory award for the ruptured intervertebral disc, the damage to the peroneal nerve and the dropped left foot described in evidence, whereas there was no evidence that these conditions were caused by any act of negligence of the defendant or in the occurrence upon which claim of liability is based.

Copy of the foregoing motion mailed this 9th day of April 1951, to T. C. Derrick, Attorney for Plaintiff.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

ORDER OF COURT DIRECTING REMITTITUR—June 25, 1951

And thereafter, to wit: on the 25th day of June, 1951, by an order duly made and entered of record in said cause the Court entered the following finding in said cause:

"If plaintiff will within ten days remit ten thousand dollars, ($10,000.00) from the jury's verdict of April the 5th, 1951, leaving the amount of same to stand at fifty thousand dollars ($50,000.00) defendant's motion for new trial will be overruled. Otherwise sustained on the ground that the verdict of the jury is excessive as set forth in specification 3 of defendant's said motion."

PLAINTIFF ENTERS REMITTITUR, VACATION OF JUDGMENT AND ENTRY OF NEW JUDGMENT

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

DEFENDANT'S MOTION FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL OVERRULED

[fol. 297] And thereafter, to wit: on the 2nd day of July, 1951 and within the time specified by the Court in which to remit ten thousand dollars of the amount of the verdict in said cause, plaintiff in open court and in writing as per memorandum filed on said date, remitted the sum of ten thousand dollars ($10,000.00) from the verdict previously returned and judgment entered thereon on April 5th, 1951. Whereupon said judgment in the sum of sixty thousand dollars ($60,000) was set aside and vacated and a new judgment as of the date of April 5th, 1951 was entered in favor of the plaintiff and against the defendant in the sum of fifty thousand dollars ($50,000.00) and costs. And on the same day, to wit: July 2nd, 1951, by an order duly entered of record in said cause the court overruled defendant's motion for judgment or in the alternative for new trial.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

JUDGMENT APPEALED FROM—July 2, 1951

The judgment which the Court entered on the 2nd day of July, 1951, as of April 5th, 1951, is in words and figures as follows:

[Caption omitted]

"Now at this day comes the plaintiff, by attorney, and here in open court and in writing this day filed pursuant to the order of court heretofore made and entered herein on the 25th day of June, 1951, remits the sum of ten thou-
[fol. 298] sand dollars ($10,000.00) from the verdict and judgment heretofore rendered in his favor on the 5th day of April, 1951. Reducing said judgment to the sum of fifty thousand dollars ($50,000.00).

Wherefore it is considered and adjudged by the Court that plaintiff have and recover of the defendant, the sum of fifty thousand dollars ($50,000.00) in lieu of the judgment entered in favor of the plaintiff and against the defendant on the 5th day of April, 1951 in the sum of sixty thousand dollars ($60,000.00), together with the cost of this proceeding and let execution issue therefor.

It is further ordered by the Court that defendant's motion for judgment in accordance with its motion for a directed verdict at the close of all the evidence or in the alternative motion for a new trial be, and the same is, hereby overruled.

Memo. filed.

[fol. 299] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

NOTICE OF APPEAL—Filed July 3, 1951

Notice hereby given that New York, Chicago and St. Louis Railroad Company, a corporation, defendant above named, hereby appeals to the Supreme Court of Missouri from the judgment entered in this action on the 2nd day of July, 1951.

Dated July 3, 1951.

MEMORANDUM OF THE CLERK

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated:

Tyree C. Derrick, 418 Olive St., St. Louis, 2, Mo., Atty for plff.

I have also mailed a copy of the notice of appeal to the Clerk of the Supreme Court of Missouri together with the docket fee deposited by appellant.

Dated July 11th, 1951.

Phelim O'Toole, Circuit Clerk. By James O. McConnell, Deputy Clerk.

[fol. 300] ORDER APPROVING TRANSCRIPT OF THE RECORD ON APPEAL

And now in order that the foregoing matters and things, pleadings and judgments, rulings of the trial Court at the trial of the cause and on the various motions filed in connection with said cause, may appear of record and be preserved for presentation to the appellate court, the Supreme Court of Missouri, on the appeal of this cause to said court from the judgment of the trial Court, the defendant, appellant, now presents to the Court, this its transcript of the record on appeal, and prays that the same may be signed, sealed, filed, approved and made a part of the record in said cause. All of which is accordingly done on this —— day of ——, 1951.

Wm. S. Connor, Judge of the Circuit Court of the City of St. Louis, Missouri, Presiding in Division No. 5 at the time of the trial of said cause and the signing of this transcript of the record.

Approved: Tyree C. Derrick, Attorneys for Plaintiff. (respondent). Lon Hocker, Attorneys for Defendant (appellant).

[fol. 301] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 302] IN THE SUPREME COURT OF MISSOURI

No. 42,803

PROCK STONE, Respondent,

vs.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

ARGUMENT AND SUBMISSION—January 22, 1952

Come now the parties, by their respective attorneys, and after arguments submit the above-entitled cause to the Court.

IN THE SUPREME COURT OF MISSOURI

PROCK STONE, Respondent,

vs.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Circuit Court of the City of St. Louis

JUDGMENT—April 14, 1952

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor.

(Opinion filed.)

[fol. 303] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, JANUARY SESSION, 1952

No. 42,803

PROCK STONE, Respondent,

vs.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation, Appellant

OPINION—April 14, 1952

Appeal from the Circuit Court of the City of St. Louis

HONORABLE WILLIAM S. CONNOR, Judge

This is a Federal Employers' Liability Act (herein called the Act) case. Secs. 51-59, 45 USCA. Plaintiff-respondent (herein called plaintiff) had a $60,000 verdict against defendant-appellant (herein called defendant). To avoid sustension of defendant's motion for new trial, plaintiff remitted $10,000. Defendant appeals from the ensuing $50,000 judgment.

Plaintiff's injuries resulted from a "wrenched" back. They consisted of a herniated disc (later excised) and damage to two lower vertebrae, the causa equina and the right peroneal and sciatic nerves, and a "dropped" right foot.

Defendant's first assignment is that the trial court erred in failing to sustain its motion for a directed verdict. As we have concluded that plaintiff did not make a submissible case under the Act, we need not rule the other matters briefed and argued here.

Before describing the circumstances under which plaintiff sustained his injury, we should state that the record does not contain evidence upon which to base any inferences either that defendant was negligent or that plaintiff's injuries resulted from defendant's alleged negligent acts or omissions. The general principles involved are also first stated.

[fol. 304] Under the Act, the railroad is not an absolute insurer of its employees; the Act imposes liability only for injuries due to negligence. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. Negligence under the Act is determined by Federal decisional law. Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. The employee must show that the railroad was negligent and that such negligence was the proximate cause, in whole or in part, of the injury. Tennant v. Peoria and Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed 610, 143 ALR 967; Atchison T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896.

"Negligence cannot be based merely upon what is possible to occur. 'Negligence which imposes liability must result from a faulty or defective foresight. Negligence is predicated on what should have been anticipated, rather than what happened.'" Williams v. Terminal R. Assn. of St. Louis, 339 Mo. 594, 98 SW 2d 655. The standard is "what a reasonable and prudent person would have done under the same circumstances." Wilkerson v. McCarthy, supra. "Foreseeability" depends upon the danger to be avoided and consequences reasonably to be anticipated. Urie v. Thompson, supra.

Generally, determination of a defendant's negligence is for the jury. "To the maximum extent proper, questions in actions arising under the Act should be left to the jury." Tiller v. Atlantic Coast Line R. Co., supra. See Tatum v. Gulf, M. & O. R. Co., 359 Mo. 709, 223 SW 2d 418. Negligence issues must be submitted if the "evidence might justify a finding either way on those issues." Wilkerson v. McCarthy, supra. "Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear." Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. See Tatum v. Gulf, Mobile & O. R. Co., supra; Nance v. Atchison, T. & S. F. R. Co., 360 Mo. 980, 232 SW 2d 547. And "* * * it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view [fol. 305] of the evidence most favorable to the plaintiff." Concurring opinion of Mr. Justice Frankfurter in Wilker-

son v. McCarthy, supra. The appellate court neither weighs the evidence nor determines the credibility of the witnesses. Lavender v. Kurn, supra. "The rule as to when a directed verdict is proper, hereinbefore referred to, is applicable to questions of proximate cause." Brady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

Plaintiff, aged 44 when injured, had been either a farmer or a common laborer all his life. He began working for defendant in November, 1948; was on the "extra gang" for five or six months; was then transferred to the section crew. Slagle was the "boss" and Stoughton was "straw boss" or Slagle's assistant. Other members of the crew were Hopkins, Fish and Denny.

Plaintiff was injured on or about May 2, 1949, while working on defendant's Y track at Argus, Indiana. This Y is a connecting track between the Lake Erie (east-west) and the Nickel Plate (north-south) main lines. The crew was "trimming," which for a track under ballast (as was this Y), consists of: digging out around the end of the tie, under the tie and in the "crib" on each side. The rails are jacked up to relieve the pressure on the tie; the spikes are pulled and the plates "knocked off"; the tie is "jerked" and sometimes the trench is deepened. The tie is pulled out, "usually always with two men working together pulling" with tongs. "It generally pulls right out if there is nothing wrong." When the two cannot pull it out, the rails are jacked higher. According to plaintiff, "sometimes they raise the track about an inch, sometimes maybe a little more." If the two cannot pull the tie, efforts are made by the two pulling and a third man "prying." If that doesn't work, a fourth "mauls" the other end of the tie while the two pull and the third "prys." If there is an old spike protruding downward from the tie, "it usually takes three or four men" to pull the tie. "It is awful hard" for two men, without someone prying and someone mauling, to pull such a tie.

[fol. 306] Plaintiff and Fish were pulling ties with tie tongs. Plaintiff had often used tie tongs and a "lot of times" he had pulled out ties by himself. Plaintiff came to a certain tie. "I practically maybe took hold of the tongs and pulled it myself. I don't know for sure, anyway, I know Fish had to get on the tie with me, and we both couldn't pull it, and Stoughton was around somewhere, we asked him; we

told him about the tie; it was hard to come out or something [and then, plaintiff later admitted, he asked for "more jack" and Stoughton jacked up the rails higher]: so he [Stoughton] picks up a bar, walks over to the other end; *'maybe,'* he says to me, *'you are not trying, you ain't pulling hard enough.'* So he puts the tie, fixed a bar under the end of the tie, he got a "prizen hold' over the rail and give us a lift. We give a pull and it wouldn't come, * * * the tie seemed loose but something semed to be holding it * * * and he [Stoughton] said, *'you are not pulling, if you can't pull that tie I will get somebody on both tongs that can.'* * * * Well, we both got back down and give a hard pull with him a prying and I hurt my back. * * * I just raised up and turned the tongs loose. I guess I was pretty mad. I said, 'I am never going to pull on a tie like that *that hard again.'* * * * I said, 'I am not pulling on no damned tie *that hard* any more.' * * * I didn't work any more on that tie. * * * I just walked up the track, I was kind of bent over, I had a pretty severe pain so I walked away and rubbed my back, got straigtened up a little and directly back, I would say, ten or fifteen minutes, I came back on the job." Plaintiff worked the rest of that day and continued to work with the crew regularly, outside of two days, until June 7, 1949.

The tongs were "not defective, and didn't slip off or break." Plaintiff did not fall down and nothing struck him—"it was *just the force of the pull, the jerk.*" Fish, who was pulling with him, "wasn't laying down on the job." Fish didn't give any "unexplained" or "unexpected" jerk. The *jerk* that plaintiff and Fish made *"was ordinarily enough to pull a tie* [without a spike in it] *out."*

While plaintiff was away, the tie was pulled by two men pulling, one "prying" and one "mauling." It had a five [fol. 307] (or six-inch spike extending from its bottom. Plaintiff had never pulled on such a tie before, although he had seen them.

Fish had been a section hand for defendant for 28 or 30 months. He and plaintiff had "pulled quite a few ties together" that day. Generally, one man alone was sufficient on the tongs, but "we doubled up and the tie wouldn't come. We would jerk it, it might move an inch I would say at a time and Mr. Stone asked for more jack. * * * We had the

rails off the tie, you have to have a jack under each rail?" The rails were probably ¾ inch up off the tie. Stoughton gave the jacks another notch when plaintiff asked for it. "We still couldn't pull it. * * * Mr. Stone asked for more jack and we couldn't give it any more, had it high enough then, and so we doubled up and Dick [Stoughton] came down with a bar and put it over the south rail and pried on the other end, and bumped it as we jerked and it still couldn't come. So Prock [plaintiff] and I gave it a big jerk, that is when he quit and said he hurt his back. * * * Dick [Stoughton] claimed he *"wasn't pulling hard enough* and oh, they kinda' got into it back and forth. * * * Dick said he [plaintiff] *wasn't pulling hard enough, if he couldn't pull to get to hell off of it and he would get somebody that would.* * * * We gave it another pull: * * * I was pulling just as hard as he was and there was no jerk or jar that I noticed."

Fish had had experience of that kind. "It is nothing unusual to have a spike sticking through a tie. * * * It *usually* takes two or *three* men to try and get a tie like that out. * * * They most generally hook *two* men on them. * * *" Also, generally, the trench is dug deeper, "kind of a V shape and let that spike not hit anything. * * * We would turn it sideways if the ditch is deep enough." However, he did not believe that that could be done on that particular tie.

Hopkins said that Stoughton "told Mr. Stone to *pull harder.* Mr. Stone told him *he was pulling hard as he could.* Mr. Stoughton, said, *'If you can't pull any harder, I will get somebody that will.'* " Hopkins had never pulled a tie with a spike in it. But he had seen such ties that *"more than one* [fol. 308] man had to work on."

Stoughton described the method (summarized above) of removing ties from a track under ballast. On two or three occasions they had trouble removing ties with spikes in them at the Y; he helped pull two such; it took *three* or four men to get them out. Stoughton did not recall the incident to which plaintiff and Fish had testified. He had observed nothing unusual that morning about the manner in which plaintiff did his work. He denied ever having said on that or any other occasion, "if you can't pull on that tongs

harder, I will get somebody on there who can." He did not know that plaintiff "was hurt until some time in June, but said that if plaintiff was hurt while working at the X, it was about the time when the crew had trouble getting out two or three ties with spikes in them. He recalled three or four instances wherein plaintiff had asked him to jack up the rails a little higher. He did not recall any argument when they had trouble getting out a tie or when plaintiff jerked on a tie. He had had only one argument with plaintiff—when he reprimanded him for pouring ashes in the coal bucket at the car knocker's shanty, the car knocker having complained to Stoughton.

Slagle, section foreman, was not present that day. He saw the tie afterward. In his experience, "it is very seldom you ever have one [a tie with a spike in it], we haven't had over three since I have been foreman * * * eleven years and a half." He had had occasion to pull such a tie "a few times, very seldom. * * * They don't know the spikes are in the ties till they get them out. If they pull hard, I have always told them * * * to dig the trench deeper. *Three* or four men would not be necessary if they dig the trench deeper. * * * They know something was holding it or it wouldn't pull so hard."

In his Instruction No. 1, plaintiff submitted three theories of defendant's negligence: ordering plaintiff to over-exert himself, failure to furnish sufficient manpower, and failure to jack the rails higher. Defendant denied negligence and submitted plaintiff's contributory negligence.

[fol. 309] Plaintiff showed when, where and how he wrenched his back and that the wrench caused his injuries. But did he make a submissible case as to either negligence or causal connection?

Plaintiff's first charge of negligence was Stoughton's "order." In his brief, plaintiff says that the applicable portion of his Instruction No. 1 "required the jury to find that, if the tie couldn't be *safely* removed by the plaintiff with the exertion of the customary amount of force (which the defendant knew or should have known) the defendant nevertheless ordered and directed the plaintiff to exert an *additional* amount of force to accomplish the removal of the tie, then the jury could find that the defendant's order was negligent."

We observe that the submission was not that the tie could have been removed with *reasonable* safety,—of which, more anon. But was there any evidence from which it could be reasonably inferred that a reasonably prudent "straw boss" should have foreseen the possibility of plaintiff being injured as a result of the order? Plaintiff asserts that "there was sufficient evidence for the jury to reach a finding that Stoughton knew or should have known that Stone might be injured if directed to pull harder or exert more force." But there was absolutely no evidence from which the jury could have inferred that the tie could not have been *safely* removed by plaintiff, Fish and Stoughton, with plaintiff pulling harder or exerting more force. In other words, there was evidence neither of actual knowledge nor "foreseeability" that plaintiff might be injured as a result of his compliance with the order.

Plaintiff was strong, had the physical strength of the average section hand and was in good health. For four years he had performed the exacting work of a farmer and of a common laborer in industry and, for thirteen years, of a tool dresser and a driller in oil fields. During all this time he had sustained only three minor injuries. These "didn't amount to much" and he was never injured to an extent that he "couldn't work for a few days or a week or any length of time." He testified: "I have been sick * * * never had any serious illness" other than stomach trouble, and "I got rid of that about fourteen [fol. 310] years ago." His work for defendant was "heavy," involving use of physical energy. Apparently, he had been performing his work satisfactorily. He had been "working pretty steady, missed very few days." He had received one raise in pay and was in line for other raises. Stoughton (and apparently, the other section hands) had not observed anything unusual about the manner in which plaintiff did his work. Plaintiff had never complained to Slagle, Stoughton or the other members of the crew. Upon such evidence, Stoughton certainly cannot be charged with any actual or constructive knowledge that plaintiff could not "safely" pull harder or exert more force.

Whether defendant was negligent hinges upon what

reasonable prudence required Stoughton, under all the circumstances, to anticipate. So far as he knew or should have known, plaintiff was efficient, strong and in good health. The site was not unsafe; the instrumentalities were not inherently dangerous; the work was not hazardous; the tools were not defective. The usual and customary methods were followed. The record contains not even a suggestion that such methods were in any way dangerous or that it was "unsafe" to order a section hand to help pull a tie with a spike in it with more than the usual and customary force (as hypothesized in Instruction No. 1, although plaintiffs testimony was that he had not used more than his usual and customary force). We find no evidence upon which Stoughton could reasonably be charged with the duty of anticipating that plaintiff might be injured *in any way* by complying with the order. Compare Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal. App. 974, 217 P. 2d 45.

Plaintiff argues that Stoughton "had an obligation to determine what was holding the tie before giving an order to Stone to exert more force." The evidence was such that the jury could have inferred that Stoughton should have known the tie had a spike in it. Even so, his order either *was* or *was not* a negligent one.

Plaintiff says that Gulf, Colorado & Santa Fe Ry. Co. v. Waterhouse, (Tex. Civ. App.) 223 SW 2d 654, is decisive. [fol. 311] In that case, a section hand, an experienced workman and accustomed to doing manual labor in hot weather, sustained injuries as a result of becoming overheated while cutting brush on the afternoon of an "awful hot" or "really hot" day. It was held that the foreman's initial order to Waterhouse to cut brush was not negligence in that: while he did not set the pace of the work (i.e. he left them "free to adjust their efforts to the prevailing weather and their own physical capacities"), and while he could have anticipated that the members of his crew would become hot, "he certainly need not have anticipated that they would have become overheated and ill." But *after* Waterhouse complained *of the effect of the work* upon him, the foreman's subsequent order was a negligent one: "The proof referred to shows that plaintiff told the foreman that he was becoming overheated, and the circumstances known to

the foreman at the time, namely, the prevailing heat and closeness of the air, the arduous nature of plaintiff's task, and the *plaintiff's physical condition,* were enough to put the foreman upon notice that plaintiff could not continue to do such work without becoming ill, even though he attempted to lessen his exertions, and the foreman's [subsequent] order to plaintiff to return to work was accordingly wrongful." (Our italics.)

The Waterhouse case squarely fixes negligence upon facts contrary to those instantly involved. We quote: "The following statement from Doty v. Ft. Worth & D. C. R. Co., 127 Tex. 521, 95 SW 2d 104, 105, supports our conclusion regarding the proof of both grounds of negligence established by the jury's findings: '(The foreman) had the right to assume that he was dealing with a man in normal physical condition and capable of doing heavy work like that required of members of a bridge gang, and that such a man, knowing his own strength, would not push or pull beyond his capacity to endure. In the absence of a showing of knowledge on his part that Doty (the workman) was not in such condition, it cannot be said that there is any evidence that he failed to act as an ordinarily prudent person would have done under the circumstances, or that such a person, situated as he was, could have reasonably foreseen or anticipated injurious consequences to flow from the [fol. 212] doing of the act.'"

Stoughton had the right to assume that plaintiff was in normal physical condition and capable of doing his work; and that plaintiff, knowing his own strength, would not pull beyond his capacity to endure. The undisputed evidence was that plaintiff actually was in such a condition and, according to plaintiff himself, the jerk which he and Fish made on the tie when he wrenched his back was "ordinarily enough to pull a tie [without a spike in it] out." Thus, plaintiff actually complied with the order in the manner in which Stoughton rightly could assume plaintiff would comply. Stoughton reasonably could not have been required to anticipate that plaintiff's compliance might result in injury. Compare Lowden v. Bowen, 199 Okla. 180, 183 P. 2d 980. Contrast Hamilton v. Standard Oil Co., 323 Mo. 531, 19 SW 2d 679, wherein the master had actual knowledge of the servant's weakened physical condition.

Furthermore, the Waterhouse case is distinguishable in that plaintiff, unlike Waterhouse, made no protest against working when he was not in physical condition. Plaintiff's report to Stoughton that he and Fish were having difficulty was not, as plaintiff argues, a "protest" against his being required to over-exert himself. Plaintiff's own testimony was that he merely reported that he and Fish could not pull the tie. Contrast Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490. At plaintiff's request, the rails had been jacked up as far as possible even before he and Fish made other efforts and before they called upon Stoughton to "pry." Nor was plaintiff's statement (that he was pulling as hard as he could) prior to the issuance of the order—after the first effort of plaintiff, Fish and Stoughton—apparently motivated by any apprehension of injury to himself. In any event, plaintiff admitted that, on the next effort of the three (in which he sustained his injuries) he exerted no more effort than he ordinarily did in pulling a tie without a spike in it.

[fol. 313] Plaintiff cites Crane v. Liberty Foundry Co., 322 Mo. 592, 17 S.W. 2d 945; Williams v. Terminal R. Assn. of St. Louis, (Mo. App.) 20 S.W. 2d 584; Plummer v. Ford, (Mo. App.) 208 S.W. 489; Chicago, R. I. & P. Ry. Co. v. Cline, 91 Colo. 255, 14 P. 2d 495; Port Angeles Western R. Co. v. Tomas, (C.C.A. 9th) 36 F. 2d 210; 18 R.C.L., Master and Servant, Sec. 149, p. 655. All involve *hazards* to the workman which the reasonably prudent superior should or should not have anticipated. What *hazards* to instant plaintiff should Stoughton be required to have foreseen when he gave the order? None.

Did defendant fail to furnish sufficient help? Plaintiff says that the master's duty is to furnish a sufficient number of men to do the work with safety to the men. Observing that the requirement is *reasonable* safety, that issue is submissible only where there is evidence upon which the jury can base reasonable inferences. This rule is applied in the cases plaintiff cites: Hulsey v. Tower Grove Quarry & Construction Co., 326 Mo. 194, 30 S.W. 2d 1018; McMullen v. M. K. & T. Ry. Co., 60 Mo. App. 231; Blair v. Baltimore & O. R. Co., supra. The issue was not submissible in the instant case because there is no evidence whatever from

which it could be inferred that the number furnished was not sufficient to enable the workman or workmen to do the work with *reasonable* safety.

The parties appear to be in agreement that defendant was required to use reasonably safe methods. Plaintiff says that "there was no evidence at all that the method forced on Stone by the defendant in removing a tie with a spike in it was a reasonably safe method." The undisputed evidence was that, at the time he gave the order, Stoughton and his crew were following the regular and usual method of getting out a tie hard to remove—and one that probably had a spike in it. True: "The test of a defendant's negligence was not custom or usage, but what reasonable prudence would require under the circumstances." Terminal R. Assn. of St. Louis v. Schorb, (C.C.A. 8th) 151 F. 2d 361, 364. But here there was no evidence that the customary and usual [fol. 314] methods used were "unsafe,"—no evidence even intimating that defendant knew or should have known that the "prevalent standards of conduct were inadequate to protect petitioner [instant plaintiff] and similarly situated employees." Urie v. Thompson, supra. Not only was there no evidence that the methods were not reasonably safe, but the only reasonable inference possible, from the evidence given, was that the methods *were* reasonably safe. Contrast these cases cited by plaintiff: Spencer v. Quincy, O. & K.C. R. Co., 317 Mo. 492, 297 S.W. 353; Perryman v. Missouri Pacific R. Co., 326 Mo. 176, 31 S.W. 2d 4; Grandstaff v. Wabash Railway Co., (Mo. App.) 71 S.W. 2d 174. Boston & M. R.R. v. Meech, (C.C.A. 1st) 156 F. 2d 109, cited by plaintiff, is inapplicable, in that the "further possible precautions" that could have been taken related to a safe place of work and the operation of a locomotive, not safe methods of work with nonhazardous tools or instrumentalities.

Plaintiff argues that Stoughton failed to furnish sufficient help because "it took four men to remove the tie." But the undisputed evidence was that it *usually* took three *or* four men to pull ties with spikes in them. And there was no evidence upon which could be based any inference that Stoughton should have abandoned the "three-man" method after a single effort.

Plaintiff's final charge of negligence was failure to jack

the rails higher. The evidence was that they were jacked up as high as they should be jacked. Plaintiff said they could not be jacked "too high, you can jack it up plenty to slide a tie [without a spike in it] out." Fish said that the rails were as high as they were generally raised and as high as needed to pull ordinary ties. There was no dispute but that if the rails, with ties still spiked, are jacked too high, the ballast falls into the tie beds and causes a "hump in the track."

However, Fish and Hopkins said, the spikes in the ties for a half-rail length in both directions *could* be pulled and the rails themselves raised, off the ties, to any desired height; that would take a little more time but a tie with a spike in it *could* then be pulled by *two* men. Stoughton and Slagle [fol. 315] said that while this *could* be done, it would take a "lot longer." Stoughton said that it was "impractical" because it would require stopping trains (apparently running between the Lake Erie and Nickel Plate main lines, respectively) "coming and going there all the time and using the Y so much." Stoughton did say that lifting the rails, as suggested by Fish and Hopkins, would be a "lot safer" (to the section crew). Slagle thought the suggestion was "foolish" since the removal of a tie with a spike in it was not particularly difficult under the methods used.

Defendant was required to use methods reasonably, not absolutely safe. Williams v. Terminal R. Assn. of St. Louis, supra. While there was evidence that jacking the rails up entirely off the ties was a "lot safer," there was no evidence that defendant's methods were not reasonably safe. The method plaintiff, Fish and Hopkins suggested would take longer and require holding up trains of two railroads' main lines operating over the Y. "Obviously such a method would materially slow up work. Is such work ordinarily done by reasonably careful workmen in that manner? Would this not set up higher standards than reasonable care and require a duty of absolute safety of method of work rather than reasonable safety?" Williams v. Terminal R. Assn. of St. Louis, supra.

Now, causal connection. As to Stoughton's order: Plaintiff submitted his case under the hypothesis that Stoughton

negligently ordered plaintiff to "exert more strength and jerk the tie hard enough to remove it"; and that the "order amounted to a direction to plaintiff to exert more strength than was ordinarily necessary to remove a railroad tie under ordinary and customary circumstances." Even if the order be so construed, there was no evidence that, in the pull plaintiff made after the order and in which he wrenched his back, he exerted more strength than ordinarily necessary. Plaintiff himself—the only one who knew or could know how hard he pulled—only went so far as to say that the "jerk" he gave the tie was "ordinarily enough to pull a tie [without a spike in it] out." Plaintiff admits he did not comply with the order by pulling any harder than he usually did. By his [fols. 316-317] own admission fixing the amount of energy he actually used, the order did not cause plaintiff to over-exert himself and, hence, did not cause his injuries.

Compare Simon v. Terminal R. Assn. of St. Louis, (Mo. App.) 237 S.W. 2d 244, wherein Simon's back "popped" when he started to help pick up a rail upon the order of someone other than the "straw boss." Plaintiff would distinguish that case "because there was no causal connection between the injury and the alleged negligence." But even if, as plaintiff argues, defendant ordered him "to exert more force than he was exerting," plaintiff did not, in fact, exert more force and, hence, the order was not the cause of his injury.

Plaintiff's admission is also fatal to the charge of insufficient help. There was no evidence that plaintiff exerted more strength because of lack of sufficient help. When he wrenched his back, he was pulling just hard enough to pull an ordinary tie. With Stoughton prying and Fish also pulling on the tongs, plaintiff was exerting no more strength than he ordinarily exerted. There was no causal connection between his injury and the alleged failure to furnish sufficient help.

By the same token, there was no causal connection between plaintiff's injury and the alleged failure to jack the rails higher. Even assuming that such failure was negligence, it in no way contributed to cause the injuries,—sustained by exerting ordinary, not additional, strength.

We hold that plaintiff did not make a submissible case under the Act either as to negligence or as to causation. Accordingly, the judgment is reversed.

Lue C. Lozier, Commissioner.

Van Osdol, C., concurs.
Coil, C., dissents.

Per Curiam: The foregoing opinion by Lozier C., is adopted as the opinion of the court.

All concur.

[fol. 318] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, APRIL SESSION 1952

[Title omitted]

RESPONDENT'S MOTION FOR REHEARING OR TO TRANSFER TO THE SUPREME COURT EN BANC AND SUGGESTIONS IN SUPPORT THEREOF

Comes now the respondent and moves the court to set aside its opinion and decision filed in this case on April 14, 1952, and grant respondent a rehearing or to transfer the case to the Supreme Court of Missouri, en Banc, for the following reasons:

The Court has misinterpreted material matters of law and fact as shown by the Opinion of the Court

A

As to the law with respect to respondent having made a submissible case

Although the court has cited the applicable United States Supreme Court cases, it has misconstrued their applicability and the intent of the court in those cases.

B

As to there being no evidence of actual knowledge or foreseeability on the part of Stoughton that Stone be injured as a result of his complaince with Stoughton's order

In making the above finding on page 7 of its opinion the court has failed to take into account that Stone had no [fol. 319] previous experience with a tie with a spike in it (R. 28) but that Stoughton had about 9 years of experience with the railroad on section work (R. 246) and had had experience with ties with spikes in them, two or three such ties having been encountered on this "Y" (R. 252) on which they worked for a period of less than 2 days (R. 263); that before Stone jerked on the tie and injured himself he told Stoughton that the tie wouldn't come loose with him and Fish pulling on the tongs (R. 22) and Stoughton then began prying on the tie but accused Stone of not trying (R. 22) and when Stoughton told Stone to pull harder, Stone told him *he was pulling as hard as he could* (R. 136); "Dick said he (Stone) wasn't pulling hard enough, if he couldn't pull to get to hell off of it and he would get somebody that would" (R. 114) and thereafter "Prock and I gave a *big jerk*" (R. 113).

The court further overlooked the testimony of Slagel that they knew something wa holding the tie because it pulled so hard and that with a spike in it, the tie raised up against the rail when you jerk it (R. 273) and the admission of Stoughton that it takes 4 men, two pulling, with some help prying and somebody else (R. 257).

C

As to the Court's finding that respondent admitted he had not exerted more than the usual force in obedience to Stoughton's command

The court has pointed to no evidence of any admission by Stone and the court has overlooked the following material evidence in making the above finding in its opinion on pages 8, 10, 13 and 14.

Fish and Stone told Stoughton they couldn't pull the tie out (R. 22); Stoughton told him he wasn't pulling hard

enough (R. 22); in response to Stoughton's command to Stone that "if he couldn't pull to get the bell off it and he would get somebody that would" (R. 114) Stone gave the tie a *hard pull*, a *big jerk* (R. 114, 139); Stone hurt his back and said "I am never going to pull on a tie like that, that [fol. 320] *hard* again" (R. 22); "I am not pulling on no damned tie that *hard* any more" (R. 99).

The court also overlooked the following testimony elicited by defendant on cross examination:

> Q. In other words you were pulling on this tie and pulled *too hard* and felt a strain?
>
> A. Yes sir (R. 75).
>
> Q. And this tie seemed to pull hard, at least harder than the others had pulled?
>
> A. Yes, the tie seemed loose but then something seemed to be holding it * * *" (R. 76).
>
> Q. It was just the *force* of the pull?
>
> A. Yes the pull, the jerk (R. 78).
>
> Q. Then as far as you figured your trouble was caused or started by the time at the Y when you were pulling out those ties and you just *pulled hard* and got a catch.
>
> A. That's when it started—— (R. 83, 84).

D

As to the finding that Stoughton could not have known what was holding the tie until after it had been removed

The court in this finding at page 8 of its opinion overlooked the following positive testimony:

1) Lloyd Fish's statement that the tie wasn't free to come out and it came up against the rails (R. 116); that it was not unusual to find a tie with a spike sticking through it and that the tie pulled hard and this often happens when a spike head is broken off and driven through with a plug (R. 148-149);

2) That Stoughton was a seasoned railroader of 9 years experience (R. 246) and had encountered two or three ties with spikes in them on this particular "Y" (R. 252) in less than 2 days of work (R. 263).

[fol. 321] 3) Eugene Slagle, Stoughton's superior, who testified that they knew something was holding the tie be-

cause with a spike in it, the tie raises up and hits the rail when you jerk on it (R. 273).

E

As to the Court's conclusion that respondent's report to Stoughton that he and Fish were having difficulty was not a "protest" against his being required to over-exert himself but a routine report for more help.

The court in reaching this finding at page 10 of its opinion has apparently failed to construe all of the evidence together and has lost sight of the following evidence:

> That Stone protested that the tie was hard to come out (R. 22) and that after being told by Stoughton that he wasn't pulling hard enough (R. 22, 114, 136) he retorted by saying that he was pulling *as hard as he could* (R. 131) and after jerking the tie in obedience to his superior's command he said he was not pulling on no damned tie that *hard* again (R. 22, 99).

F

As to the Court's finding that respondent's statement that he was pulling as hard as he could was not motivated by any apprehension of injury to himself.

The court in reaching this finding on page 10 of its opinion has not based it on any record evidence and the finding is contrary to the evidence set forth in B and C.

G

As to the conclusion that there is no evidence from which it can be inferred that the number of men furnished was not sufficient to enable the workmen to do the work with reasonable safety.

This finding on page 11 of the opinion overlooks the positive evidence that it took *four* men to remove the tie in question (R. 115-116) and the reluctant admission of defendant's [fol. 322] chief witness that it was "awful hard" to remove a tie with a spike in it and that it took four men to do it, two men with help from somebody prying and somebody else

(R. 257-258) and your own finding on page 3 of the opinion that it is awful hard for two men, without someone prying and someone mauling, to pull such a tie.

H

As to the finding that at the time respondent was injured the crew were following the regular and usual method of getting out a tie that had a spike in it

In reaching this finding on page 11 of its opinion the court overlooked the evidence and the finding of this court that it usually takes four men, two men pulling, with someone prying and someone mauling to pull a tie with a spike in it (R. 257-258, opinion page 3).

The court also overlooked the testimony of the section foreman who was over all of the men on this section gang and whose direction was that if a tie pulled hard "I have always told them to push it back over and dig their trench deeper" (R. 273-274); and Stone's testimony that "we would dig a ditch alongside of it and kind of slide the tie over into it and pull it on out" (R. 26).

I

The Court has misinterpreted and misapplied the rule of law as set out in the case of Gulf, Colorado and Santa Fe Ry. vs. Waterhouse (Texas) 223 S.W.(2) 654 and created a Federal question requiring the transfer of the case to the court en banc under Missouri Constitution, Article V, Section 9

J

The Court has misinterpreted and misapplied the rule of law as set out in the case of Boston and Maine R.R. vs. Meech, 156 F(2) 109 and created a Federal question requiring the transfer of the case to the court en banc, under Missouri Constitution, Article V, Section 9

[fols. 323-339] K

As to the Court's Conclusions and Comments on the Evidence

The court has misinterpreted the law of the United States Supreme Court 1) with respect to conclusions reached by it on pages 8, 10, 13 and 14 of its opinion that Stone admitted that he didn't exert more force; 2) with respect to its comment on page 10 of its opinion that Stone's "protest" was a mere "routine report"; 3) with respect to its expression of opinion on page 10 that Stoughton's order amounted only to "customary riding"; 4) with respect to the court's emphasis of defendant's testimony on page 13 of the opinion that the method of doing this when suggested by plaintiff was "impractical" and "foolish." The court has substituted its findings from the evidence for those of the jury, and has argued the evidence as if to the jury.

Prayer

Wherefore, for the reasons stated, respondent prays the Court to set aside its decision and opinion filed in this case on April 14, 1952, and to grant respondent a rehearing, or to transfer this case to the Supreme Court of Missouri, en Banc.

Respectfully submitted, Tyree C. Derrick, Karl E. Holderle, Jr., 418 Olive Street, St. Louis 2, Missouri, Attorneys for Respondent.

[fol. 340] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING OR TO TRANSFER—June 13, 1952

Now at this day, the Court having seen and fully considerated the motion of the respondent for a rehearing in the above-entitled cause or to transfer said cause to the

Court en Banc, doth order that said motion be, and the same is hereby overruled. It is further ordered by the Court that the opinion herein be, and the same is hereby modified on the Court's own motion.

Note: The opinion as modified appears on page 303 of this transcript.

[File endosement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

MOTION OF RESPONDENT TO WITHHOLD MANDATE—Filed June 18, 1952

Comes now the plaintiff Prock Stone, Respondent in the above entitled cause, and states and shows to the Court [fol. 341] that it is the intention of respondent to petition the Supreme Court of the United States for a Writ of Certiorari in said cause.

Wherefore, respondent moves the Court to withhold its Mandate in the above entitled cause until respondent can prepare and file his said petition for a Writ of Certiorari to the Supreme Court of the United States.

Tyree C. Derrick, Karl E. Holderle, Jr., 418 Olive Street, St. Louis, Missouri, Attorneys for Respondent.

A copy of the within motion was this 17 day of June, 1952, mailed to Messrs. Jones, Hocker, Gladney & Grand, Attention Mr. Lon Hocker, 407 North 8th Street, St. Louis 1, Missouri, Attorneys for Appellant.

Tyree C. Derrick.

[File endosement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER WITHHOLDING MANDATE—June 18, 1952

Now at this day, the Court having seen and fully considered the motion of the respondent, this date filed herein, to withhold the mandate in the above-entitled cause, doth order that said motion be, and the same is hereby sustained, and the mandate is ordered withheld for ninety days from June 13, 1952.

[fol. 342] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

RE: Petition of Prock Stone for Writ of Certiorari to the Supreme Court of the United States, pursuant to Title 28, United States Code, Section 1257.

To The Honorable Marion Spricer, Clerk of the Supreme Court of Missouri:

PRAECIPE FOR RECORD—Filed July 26, 1951

You are hereby requested to include the following documents in the certified Transcript of the Record to be transmitted in the above entitled matter to the United States Supreme Court:

1. Transcript of the Record of the proceedings in the Circuit Court of the City of St. Louis in the case of Prock Stone v. New York, Chicago & St. Louis Railroad Company, a corporation, No. 40009.

2. Submission of the case in the Supreme Court of Missouri on January 22, 1952.

3. Copy of the opinion and judgment of the Supreme Court of Missouri entered on April 14, 1952, as modified by the order of the Court on June 13, 1952.

4. Copy of "Respondent" Motion for Re-hearing or to Transfer to the Supreme Court en Banc and Suggestions in Support Thereof" filed in the Supreme Court of Missouri on April 26, 1952.

5. Copy of order overruling "Respondent's Motion for Re-Hearing or to Transfer to the Supreme Court en Banc" and order of the Court modifying opinion entered on June 13, 1952.

6. Copy of "Motion of Respondent to Withhold Mandate" filed on June 18, 1952.

7. Copy of the order of the Supreme Court of Missouri staying the mandate for ninety (90) days from June 13, 1952.

[fol. 343] 8. Copy of this Praecipe

Tyree C. Derrick, Karl E. Holderle, Jr., 418 Olive Street, St. Louis 2, Missouri, Attorneys for Respondent.

Receipt of a copy of the above Praecipe acknowledged this 25th day of July, 1952.

Jones, Hocker, Gladney & Grand Lon Hocker. By Lon Hocker, Attorneys for Appellant.

[fol. 344] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 345] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION ON PRINTING RECORD

It is hereby stipulated by and between the parties hereto that in printing the transcript of the record in this case, in connection with the petition of Frock Stone, for certiorari, the Clerk of the Supreme Court of the United States

delete from the transcript of the record of the trial court the following portions:

Omit the testimony of Prock Stone from A on page 32 to B on page 39.

Omit the cross examination of Prock Stone from A on page 53 to B on page 62, and from A on page 85 to B on page 93.

Omit the Hospital Record from A on page 104 to B on page 107.

Omit the cross examination of Lloyd Fish from A on page 125 to B on page 133.

Omit the cross examination of Charles Hopkins from A on page 142 to B on page 147.

Omit the testimony of Dr. S. A. Levy from A on page 153 to B on page 178.

Omit the testimony of Dr. F. G. Pernoud from A on page 179 to B on page 200.

Omit the testimony of Dr. Arthur M. Thompson from A on page 201 to B on page 210.

Omit the redirect and recross examination of Prock Stone from A on page 210 to B on page 213.

Omit the testimony of Richard Stoughton from A on page 260 to B on page 261.

Tyree C. Derrick, Attorney for Petitioner, Jones, Hocker, Gladney and Grand. By Lon Hocker, Attorneys for Respondent.

[fol. 346] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 320

PROCK STONE, Petitioner,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed October 27, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. This case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

'ROCK STONE,
Petitioner,
vs.
IEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

No. 320

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri,
and
BRIEF IN SUPPORT OF PETITION.

TYREE C. DERRICK,
KARL E. HOLDERLE, JR.,
418 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PROCK STONE,
Petitioner,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Petitioner, Prock Stone's, suit for damages for personal injuries sustained while in the employ of respondent, based on the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59), was filed in the Circuit Court of the City of St. Louis, Missouri, on August 22, 1950 (R. 1). When

tried to a jury it resulted in a verdict and judgment for petitioner in the sum of $60,000 (April 5, 1951) (R. 117); thereafter, on July 2, 1951, petitioner, in order to avoid a new trial, remitted $10,000 from said verdict and judgment (R. 121).

On appeal by respondent from the judgment to the Supreme Court of Missouri, the judgment in petitioner's favor was reversed because in the court's opinion the evidence was not sufficient to make a jury case (R. 125).

At the time of petitioner's injuries on or about May 2, 1949, he was employed by respondent as a track laborer at Argos, Indiana (R. 7). The employment of the plaintiff and the fact that both plaintiff and defendant were engaged in interstate commerce was admitted by the pleadings (R. 4, 5). While so employed, Stone was working on respondent's track at a place called the "Y" track formed by a track connecting the two main lines of respondent (R. 9-11).

At the time of his injury, petitioner was assigned to the task of removing old and worn track ties (R. 11). The straw boss, Richard Stoughton, was in charge (R. 8). Petitioner and a fellow-employee, Lloyd Fish, were unable to remove a particular tie in the usual, ordinary and customary manner, because a spike driven through the tie into the ground prevented its removal by pulling on the tie with tie tongs (R. 12). Petitioner told Richard Stoughton (straw boss) that the tie was hard to come out and Stoughton picked up a bar, walked over to the other end of the tie and told petitioner he was not pulling hard enough. Then Stoughton put the bar under the end of the tie and "got a prizen hold over the rail and gave a lift." Petitioner gave a pull and the tie still wouldn't come out (R. 12, 51, 52, 60, 61). Dick Stoughton testified that in order to pull out a tie with a spike through it, it would

require the efforts of four men (R. 97). Despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he ordered plaintiff to pull harder (R. 12, 51, 52, 61). Although the testimony respecting the number of men actually assisting in extricating the tie at the time is not clear (Stoughton apparently was not prying on the tie at the precise time when plaintiff gave the fatal jerk) (R. 51, 60, 61), there was sufficient evidence to justify the jury's finding that only two men were actually working at extricating the tie.

The evidence showed that three methods of removing a tie with a spike driven through it were available and known to the defendant:

(a) Extricating the tie by the combined strength of four men, two men pulling, one prying, and somebody else hammering on the end with a spike maul (R. 53, 54, 97). This method was not recommended by the foreman, Slagle, who testified if a tie pulled hard the men should push it back over and dig a deeper trench (R. 106). He recommended a different method.

(b) Roll the tie over and dig a deeper trench beside the tie was the method recommended by Eugene Slagle, the foreman, and the method he had instructed the men to use (R. 106). Lloyd Fish described the use of this method (R. 58).

(c) Freeing the rail from the ties a half a rail length either way from the tie to be removed and jacking the rail up, freeing the tie sufficiently so that the stubborn tie can be slid out by two men with safety (R. 56, 57, 58, 63, 64). Dick Stoughton, the straw boss, admitted this method would be safer (R. 96).

At the time of plaintiff's injury the straw boss was directing the removal of the tie under method (a) with

the use of two men (R. 12, 51, 52, 60, 61). When the tie was jerked it would come up against the rail and was not free (to come out) (R. 53). Stoughton told Stone to pull harder, Stone protested that he was pulling as hard as he could (R. 61). Thereafter, Stoughton directed Stone to pull harder and taunted him for not trying and said, "If he couldn't pull to get to hell off of it and he would get somebody that would" (R. 52); "If you can't pull any harder I will get somebody that will" (R. 61). Thereupon, on the order of defendant's straw boss, Dick Stoughton, the petitioner, after protesting, gave a hard pull, a big jerk (R. 12, 52, 61). When petitioner jerked on the tie he hurt his back and said, "I am not pulling on no damned tie that hard any more" (R. 12, 44).

The testimony also showed that the straw boss had encountered several ties with spikes in them on this particular "Y" track (R. 93, 95) in less than two days of work (R. 96), and it took three to four men to get them out because the spikes stuck down into the ground and would hold the ties (R. 96). You could not raise the tie high enough because the rails weren't high enough from the ties (R. 97). The boss, Eugene Slagle, said they knew something was holding the tie because it pulled so hard and with a spike in it, the tie raises up and hits the rail when you jerk on it (R. 106). This is what happened when Stone and Fish pulled on the tie in question.

The tie in question was finally removed by four men, Charles Hopkins, Dick Stoughton, Bert Bailey and Lloyd Fish (R. 53, 54). It was removed by Fish and Hopkins pulling on the tongs, Stoughton prying with a crow bar over the rail and Bert Bailey using a maul, hammering as the tie was pulled (R. 53, 54).

Respondent's evidence was to the effect that Richard Stoughton didn't remember any complaint by Prock Stone

that he hurt his back pulling a tie (R. 94); that it would be impractical to jack the track too high because dirt will get under the ties; also, it would require the trains to stop, but it would be a lot safer that way (R. 96). Eugene Slagle, section foreman, testified that on May 2 the crew was not working at the "Y" (R. 100) and that he had never heard Stone complain of having injured his back until about June 1 (R. 103); that if a spike is through a tie it would not be necessary to take additional men to remove it if they would pull the tie back over and dig the trench deeper (R. 106). If you jack the rail too high the ballast will run under the other ties and you get a hump in the track (R. 107).

Instructions.

The court gave an instruction on petitioner's behalf requesting the jury to find that if respondent either (a) negligently ordered petitioner to exert more force than was ordinarily and customarily necessary to remove a tie, (b) negligently failed to furnish petitioner additional help in removing the tie, or (c) negligently failed to use a safer method which was available, it (the jury) could find for petitioner (R. 110-113). Defendant moved for a directed verdict which the trial court overruled (R. 110).

Verdict and Judgment.

Thereafter, on April 5, 1951, the jury returned a verdict in plaintiff's favor for $60,000.00 (R. 117) and judgment was entered on said verdict (R. 117). Defendant filed a motion for a new trial on April 9, 1951 (R. 118), which was overruled by the court on June 25, 1951, on the condition that plaintiff remit $10,000 from the verdict (R. 120). Plaintiff remitted $10,000 from the verdict, the court set aside the previous judgment, entered a new judgment for $50,000 and overruled the defendant's motion for a new

trial (R. 121). Defendant appealed to the Supreme Court of Missouri by Notice of Appeal filed July 3, 1951 (R. 121).

On April 14, 1952, Division No. 1 of the Supreme Court of Missouri reversed the judgment of the trial court on the ground that plaintiff did not make a submissible case under the Federal Employers' Liability Act (R. 125). Plaintiff thereafter filed a Motion for Rehearing or to Transfer the case to the Court en Banc (R. 138), which was overruled on June 13, 1952, and the court modified its opinion on its own motion (R. 143-144). The Supreme Court of Missouri did on June 18, 1952, on motion of petitioner, order its mandate stayed in said cause (R. 144).

The duly certified record of the case, including all of the proceedings in the Circuit Court of the City of St. Louis, Missouri, and in Division No. 1 of the Supreme Court of Missouri, is filed herewith under separate cover.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code, which provides for review by the United States Supreme Court, by Writ of Certiorari, of final judgments of the highest court of a state where any right, privilege or immunity is specially set up or claimed under the statutes of the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed was originally entered on April 14, 1951 (R. 125). A motion for rehearing and to transfer said case from Division No. 1 to the Missouri Supreme Court, en Banc, was filed on April 26, 1951, within the time provided by the rules of the Supreme Court of Missouri (R. 138), and said motion of petitioner was denied on June 13, 1952, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri became final (R. 143, 144).

Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing or to transfer the case to the Court en Banc, was the highest court of the state in which a decision could be had in said case. Petitioner has exhausted every opportunity for appellate review by the Supreme Court of Missouri.

In said case petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59 (R. 1, 125). The opinion of the Missouri Supreme Court reversing the verdict and judgment of the trial court in favor of petitioner, for the reason that petitioner's evidence did not make a submissible case under that statute, denies him the rights afforded under that statute. The court, by its decision, has, to the detriment of petitioner, resorted to an erroneous interpretation and application of a federal statute.

Cases thought to sustain jurisdiction are:

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Brown v. Western Ry. of Ala., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100;
Seago v. New York Central R. Co., 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed. 1188;
Jenkins v. Kurn, 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 1316;
New York Central R. Co. v. Marcone, 281 U. S. 345;
Chicago R. v. Devine, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140.

The questions presented herein are of general public interest and importance because they not only affect this plaintiff, but the rights of all other injured railroad employees throughout the forty-eight states to a jury trial.

under the Federal Employers' Liability Act. If the opinion is allowed to stand, there will be conflict between this and other state and federal courts as to the jury's right to determine the question of negligence and under what circumstances an employer is obligated to use a safer method of doing work. It will result in different rules being applied in different jurisdictions to the same question. The opinion limits, contorts and sterilizes the Congressional intent and the interpretation placed upon the statute by opinions of this Court.

Petitioner filed and presented this petition, together with his brief in support thereof, and the record, to this Court on September 9, 1952, which is within ninety days from June 13, 1952, the date of the judgment sought to be reviewed.

QUESTIONS PRESENTED.

The questions presented by the petitioner herein for a Writ of Certiorari are:

I.

Whether, in an action brought by Prock Stone against the New York, Chicago & St. Louis Railroad Company, under the Federal Employers' Liability Act, the evidence adduced at the trial, under the applicable decisions of this Court, was sufficient to make a submissible case for the jury?

II.

Can a State Court of last resort, under the applicable decisions of this Court, in reviewing the evidence submitted to and passed on by a jury, in an action brought under the Federal Employers' Liability Act, substitute its findings, deductions and conclusions from the evidence for

that reached by a jury in its verdict when the evidence justifies a verdict either way on the issues?

III.

Whether the evidence in an action under the Federal Employers' Liability Act of and relating to an order to pull harder, coupled with taunts and threats, given to the plaintiff in the course of his employment while engaged in interstate commerce, obeyed by the plaintiff over his protests that he and his fellow employee were pulling as hard as they could, and resulting in injury to him, is sufficient, under the applicable decisions of this Court, to warrant the submission to a jury of this charge of negligence in whole or in part, against the defendant?

IV.

Whether, in an action brought by the plaintiff under the Federal Employers' Liability Act for injuries sustained in the course of his employment while engaged in interstate commerce, the evidence that plaintiff and his fellow employee were ordered to pull a tie from under the rail, when the defendant knew, or should have known, they could not do so, and that four men were necessary to perform the task, is sufficient evidence, under the applicable decisions of this Court, to warrant the submission to a jury of this charge of negligence in whole or in part, of defendant's failure to furnish the plaintiff with sufficient help to remove the tie in question?

V.

Does the opinion of the Missouri Supreme Court in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, and that of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe Ry. v. Waterhouse, 223 S. W. (2) 654, present conflicting rules

on the same question under the Federal Employers' Liability Act of whether an order to an employee to do certain work, over his protest, is a negligent order and hence violates the rule of this Court in the case of Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court, which require uniform determinations in all jurisdictions of what constitutes a submissible question of negligence under the Federal Employers' Liability Act?

Isn't the opinion of the Missouri Supreme Court in the instant case also in conflict with this Court's opinion in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490?

VI.

Does the opinion of the Missouri Supreme Court in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, and that of the Court of Appeals (First Circuit) in the case of Boston & Maine R. v. Meech, 156 F. (2) 109, present conflicting rules on the same question under the Federal Employers' Liability Act as to whether or not an employer is required to use a safer method of doing work, which method is known to the defendant and available to it, at the time in question, and hence violates the rule of this Court in the case of Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court, which require uniform determination in all jurisdictions of what constitutes a submissible question of negligence under the Federal Employers' Liability Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

This action is brought under the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59, for injuries sustained by Prock Stone while he was in the employ of the New York, Chicago & St. Louis Railroad (R. 1, 125). It was admitted by the pleadings that both the plaintiff and the defendant were engaged in interstate commerce at the time of plaintiff's injuries (R. 4). The evidence presented to the jury showed that Prock Stone was working as a section hand on a "Y" track of the defendant at Argos, Indiana; that he was engaged in the task of removing old ties and replacing them with new ones; that plaintiff and his fellow employee, Lloyd Fish, encountered a tie with a spike driven through it extending into the ground making it unusually difficult to remove; that together they could not remove the tie by pulling on it with the tie tongs furnished them and called on their straw boss, Dick Stoughton, for additional help (R. 12, 51, 52, 60, 61).

The evidence further showed that safer methods were available to remove a tie with a spike driven through it into the ground. They are:

(a) Remove the tie by the use of four men pulling on it; two men using tie tongs, one man prying with a pinch bar and one man hammering with a maul (R. 53, 54, 97);

(b) Roll the tie over on its side and dig a V-ditch deep enough to roll the tie into and then slide it under the rail (R. 58, 106);

(c) Remove the spikes holding the rail to the ties about half a rail's length forward and back and jack the rail high

enough to clear the tie to be removed so it can be pulled out (R. 56-58, 63-64). This was testified to as being a safer method (R. 96).

There is evidence from which the jury could conclude that only two men were in fact engaged in extracting the tie at the time plaintiff was injured (R. 51, 52, 61). The straw boss, Stoughton, who testified that it required four men to pull out such a tie, nevertheless, directed Stone and Fish to pull harder, over Stone's protest that the tie was hard to come out and that he was pulling as hard as he could (R. 12, 51, 52, 60, 61). At the direction of Stoughton to pull harder, that he wasn't pulling, to pull harder or to get to hell off and he would get someone else who would, Stone gave a hard pull and injured himself (R. 12, 51, 52, 60, 61).

The evidence, with the inferences fairly and reasonably arising therefrom, tended to show that the defendant caused plaintiff's injuries by: (a) negligently ordering him to exert more force than was ordinarily and customarily necessary; (b) failing to furnish the plaintiff sufficient men to assist him in performing the task assigned to him, and (c) failing to use a safer method which was available and known to the defendant.

Nevertheless, Division No. 1 of the Supreme Court of Missouri, in its opinion in said cause (Prock Stone v. New York, Chicago & St. Louis R., 349 S. W. [2] 442), ruled that plaintiff failed to make a submissible case for the jury and ruled that the submission of the case to the jury was not based on substantial evidence.

Said ruling is erroneous and not in accord with the applicable decisions of this Honorable Court holding that on controverted or disputed evidence, the evidence is to be viewed in the light most favorable to plaintiff giving the

plaintiff the benefit of every reasonable inference and conclusion that can be drawn therefrom; that the credibility of the witnesses and the weight to be given their testimony are for the jury; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences from the evidence, such issue is not one of law for the Court, but one of fact for the jury.

II.

The Supreme Court of Missouri reversed the verdict of the jury and erroneously substituted its own inferences, findings and conclusions of fact from the evidence. This is in direct conflict with the applicable decisions of this Court holding that where there is a conflict in the evidence, the issue is one of fact for the jury and the Court cannot substitute its findings for those of the jury.

Some of the Court's conclusions, and the evidence which supports the jury's verdict are as follows:

(a)

The Court found "* * * We have concluded that plaintiff did not make a submissible case under the Act * * *" (R. 125).

The evidence showing that plaintiff made a submissible case is stated in Point I above and in the Summary and Short Statement and we incorporate that evidence by reference here.

(b)

The Court further stated in its opinion: "In other words, there was evidence neither of actual knowledge nor 'foreseeability' that plaintiff might be injured as a result of his compliance with the order" (R. 131).

Yet the record evidence from which the jury found otherwise is as follows:

Defendant's witness, Stoughton, testified that he had had nine years' experience in railroading (R. 90).

> "Q. * * * You say there were two or three occasions where you had ties with spikes in them? A. Yes, sir.
>
> Q. Was that on this north Y? A. Yes, sir (R. 95).
>
> Q. And two men without some help from somebody on the end prying and somebody else can't pull one of those ties out with the spike in them. Can they? A. No, it is awful hard" (R. 97).

Eugene Slagle testified as follows:

> "Q. If they pull it out it takes more than two men. It takes three or four men, doesn't it? A. It wouldn't be necessary if they would push the tie back over and dig the ditch deeper. It would drop down lower and then they could pull it out easy.
>
> Q. If they knew the spike was there they would do that, wouldn't they? A. They knew something was holding it or it wouldn't pull so hard (R. 106).
>
> Q. With a spike in it when you are jerking it out and you raise it hits the top of the rail as it comes up, doesn't it? A. That's right" (R. 106).

The plaintiff testified as follows:

> "Q. Did you ever see a tie that you have occasion to pull a tie out with a spike in it before? A. No, sir, I never did, I don't think I ever pulled one with a spike down through it like that" (R. 15).

From this evidence couldn't the jury reasonably infer that since the straw boss was experienced in track work, and that it usually took four men to pull a tie of the kind

in evidence when the method of pulling, rather than dropping a tie into a ditch dug for that purpose then pulling it out, was used, that injury might result from improper directions for two men to do a task that required four men?

(c)

The Court further said, in making its own conclusion, in order to justify its reversal of the jury verdict, that "The usual and customary methods were followed" (R. 132), and the Court further said:

> "The undisputed evidence was that, at the time he gave the order, Stoughton and his crew were following the regular and usual method of getting out a tie hard to remove, and one that probably had a spike in it" (R. 135).

The jury found that the usual and customary method was not followed. The usual and customary method of removing a tie with a spike through it was to either have four men pull it out (R. 97) or, preferably, to roll the tie over and dig the trench deeper so as to slide it out. There is no evidence that it was customary for two men to pull such a tie.

The evidence was as follows (Eugene Slagle):

> "A. * * * If they pull hard I have always told them to push it back over and dig their trench deeper.
>
> Q. If they pull it out it takes more than two men—it takes three or four men, doesn't it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, which would drop down lower and then they could pull it out easy.
>
> Q. If they knew the spike was there they would do that, wouldn't they? A. They knew something was holding it or it wouldn't pull so hard" (R. 106).

Lloyd Fish, plaintiff's witness:

"Q. How do you generally handle that, a tie that won't come out that way because it has a spike in it? A. You most generally dig a ditch alongside of it and deeper, kind of a V-shape, and let that spike not hit anything.

Q. You would turn the tie over, is that it? A. We could turn it sidewise if the ditch is deep enough" (R. 58).

(d)

The Court further substituted its finding of fact for that of the jury in holding that:

"* * * In any event, plaintiff admitted that, on the next effort of the three (in which he sustained his injuries), he exerted no more effort than he ordinarily did in pulling a tie without a spike in it" (R. 134).

"* * * Plaintiff admits he did not comply with the order by pulling any harder than he usually did. By his own admission fixing the amount of energy he actually used, the order did not cause plaintiff to overexert himself and, hence, did not cause his injuries" (R. 137).

"* * * But even if, as plaintiff argues, defendant ordered him to exert more force than he was exerting, plaintiff did not, in fact, exert more force and, hence, the order was not the cause of his injury" (R. 137).

"* * * There was no evidence that plaintiff exerted more strength because of lack of sufficient help" (R. 137).

Here the Court completely ignored the evidence and repudiated the jury's verdict. The evidence showed that over Stone's protest he was taunted and ordered to pull harder. In response to the command he pulled harder, he jerked on the tie. The testimony is (Buster Hopkins):

"* * * He told Mr. Stone to pull harder. Mr. Stone told him he was pulling as hard as he could. Mr. Stoughton said, 'If you can't pull any harder, I will get somebody that will.' * * *, and it went on, and Mr. Stone got down, him and Mr. Fish, and they pulled pretty hard on the tie and they jerked it * * *" (R. 61).

Mr. Fish testified:

"* * * So Prock and I give it a big jerk, that is when he quit and said he hurt his back" (R. 51).

Mr. Stone testified:

"* * * We give a pull and it wouldn't come, and he said, you are not pulling, if you can't pull that tie, I will get somebody on both tongs that can.

Q. Then what did you do? A. Well, we both got back down and give a hard pull * * *

Q. What did you do when you hurt your back? A. I just raised up and turned the tongs loose, I guess I was pretty mad, I said I was never going to pull on a tie like that that hard again and I walked up the track" (R. 12).

and

"A. You mean me? I said, 'I am not pulling on no damned tie that hard any more.' I think that's what I said" (R. 44).

(e)

In direct conflict with the evidence, the Court substituted its own finding for that of the jury as follows:

"* * * The issue was not submissible in the instant case because there was no evidence whatever from which it could be inferred that the number furnished

was not sufficient to enable the workman or workmen to do the work with reasonable safety" (R. 134, 135).

The evidence indicates that at the time plaintiff was injured only two men were working in extricating the tie (R. 52, 61) even though defendant's straw boss said the work required four men (R. 97), and the section foreman, Slagle, said the proper method was to roll the tie over and dig the trench deeper.

The testimony is (Dick Stoughton):

"Q. And two men without some help from somebody on the end prying and somebody else can't pull one of those ties out with the spike in them, can they? A. No, it is awful hard" (R. 97).

Stoughton's superior, the section foreman, Slagle, testified:

"* * * If they pull hard I have always told them to push it back over and dig their trench deeper.

Q. If they pull it out it takes more than two men, it takes three or four men to do it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, it would drop down lower and then they could pull it out easy" (R. 106).

Petitioner in his motion for a rehearing (R. 138) called the Missouri Supreme Court's attention to the fact that it was substituting its findings for those of the jury and that it ignored testimony and inferences which could be drawn from other testimony favorable to the plaintiff. The motion for rehearing was overruled by the court (R. 143, 144). This action on the part of the court was erroneous and not in accord with the applicable decisions of this Court holding that where there is a conflict in the evidence or any evidence from which a reasonable inference may be drawn, then it becomes a question for the jury and not the court.

Therefore, since the Missouri Supreme Court reversed the judgment entered on the verdict of the jury granting damages to the plaintiff under the Federal Employers' Liability Act, he was denied a right under a Federal Statute which calls for the issuance of this Court's Writ of Certiorari to bring before you the entire record for review.

III.

The opinion of the Missouri Supreme Court in the case of Stone v. New York, Chicago & St. Louis R., 249 S. W. (2) 442, brought under the provisions of the Federal Employers' Liability Act, holds that the order to Stone to exert more force, or "get the hell off," over his protest that he was pulling as hard as he could, was not a negligent order, and the evidence relating thereto did not make a submissible case. The opinion of the Texas Court of Civil Appeals in Gulf, Colorado & Santa Fe Ry., 223 S. W. (2) 654, decided under the same statute, holds that an order to Waterhouse to continue working, over his protest that the weather was too hot, was a negligent order, and would make a submissible case.

These two views are diametrically opposite, and since both were decided under the Federal Employers' Liability Act, two separate rules on the question of what constitutes a negligent order under the statute are held out as being the law.

Under the decision of this Court in Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court there must be uniformity in determining what constitutes negligence for the statute's purpose. The rules with respect to what makes a submissible case shall not vary according to each jurisdictions' conception of what evidence is sufficient to make a case for the jury.

The holding of the Missouri Supreme Court moreover is in direct conflict with the opinion of this Court in Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, which held that a submissible jury case was made in connection with an order to Blair to do the work or they "would get somebody else that would." The Missouri Supreme Court's opinion contravenes the holding of this Court in the Blair case that the nature of the undertaking which plaintiff was commanded to perform, the method of the undertaking and the number of men assigned to assist him, his experience and the experience of his foreman all raised questions appropriate for the jury to find as a matter of fact whether the injury was the result, in whole or in part, of the defendant's failure to comply with its duties.

Since the opinion of the Missouri Court sets up a different standard of negligence from that set up by this Court and by the Texas Court, this Court should issue its Writ of Certiorari to review the opinion of the Missouri Supreme Court and the evidence adduced at the trial and determine once and for all the amount of evidence necessary to make a submissible jury case, and which of the two rules shall prevail.

Unless this Court grants certiorari for the purpose of maintaining uniformity of the rules among the State and Federal Courts, numerous like erroneous rulings will be made by other courts in following first one rule and then another of the two mentioned above.

IV.

The opinion of the Missouri Supreme Court in the case of Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, brought under the provisions of the Federal Employers' Liability Act, holds that the employer is not

required to use a safer method of doing work, which safer method is both known and available to the defendant. The Court of Appeals (First Circuit) in the case of Boston & Maine R. v. Meech, 156 F. (2) 109, requires further precautions to be taken to protect employees, when available, and safer methods of doing the work to be used.

The views presented in these two cases are diametrically opposite and since both were decided under the Federal Employers' Liability Act, two separate rules now prevail on the same point. Under the decision of this Court in Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court there must be uniformity in determining what constitutes negligence for the Statute's purpose. The rulings with respect thereto shall not vary according to each jurisdiction.

Since the opinion of the Missouri Court sets up a different standard for employing a safer method than that set up by the United States Court of Appeals (First Circuit), this Court should issue its Writ of Certiorari to review the opinion of the Missouri Supreme Court and determine once and for all the question with respect to the employment of a safer method and which of the two rules shall prevail.

Unless this Court grants certiorari for the purpose of maintaining uniformity of the rules among the State and Federal Courts, numerous like erroneous rulings will be made by other Courts in following first one rule and then another of the two mentioned above.

V.

The Supreme Court of Missouri, Division No. 1, by its opinion in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, has erroneously interpreted a Federal Statute of general importance, which is

constantly involved in voluminous litigation in both Federal and State Courts, and in a way not in accord with, but directly contrary to the applicable decisions of this Court.

It is a matter of prime public importance that the right to a jury trial guaranteed to injured railroad employees and their dependents by the Federal Employers' Liability Act be recognized and enforced by every court in the land fairly, impartially, and uniformly. Not only are the rights of instant plaintiff affected hereby, but the rights of other injured railroad employees throughout the entire nation.

The question is one of great general public interest and importance, and unless the disparity between the rules set up by the Supreme Court of Missouri and the other courts mentioned herein, is resolved into uniformity by this Court, confusion will result in the state courts throughout the nation futilely attempting to reconcile the different irreconcilable rules set forth on the points mentioned herein. To that end, and to the end, too, that right and justice may prevail in this case, and that the rights of all future litigants in similar circumstances may be protected and that the Congressional intent expressed by the Federal Employers' Liability Act be not sterilized by judicial erosion, this Honorable Court's Writ of Certiorari should issue herein.

PRAYER.

Wherefore, petitioner prays this Court to issue its Writ of Certiorari, to the Supreme Court of Missouri, to review the opinion in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., No. 42,803, as decided by Division No. 1 of that court on April 14, 1952, and upon said review as provided by law, to reverse the same and reinstate the judgment of the trial court in order that there be harmony

of decisions and conformity to the Statute, and so that the right to trial by jury of litigants throughout the nation under the Federal Employers' Liability Act may be preserved.

.....

TYREE C. DERRICK,

.....

KARL E. HOLDERLE, JR.,
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St. Louis 2, Missouri,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

THE OPINION BELOW.

The opinion of the Supreme Court of Missouri which sought to be reviewed appears at pages 125-138 of the record. It has not yet been officially published but is reported in 249 S. W. (2) 442.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code. The jurisdictional statement in the petition, pages 6-8, is in more detailed form and is incorporated herein by reference.

SUMMARY STATEMENT OF THE CASE.

A summary statement of the case is set out in the petition, annexed hereto, on pages 1-6, and is incorporated herein by reference.

SPECIFICATIONS OF ERROR.

The Supreme Court of Missouri, in its opinion, erred:

1. In holding that the evidence was insufficient to make a submissible case for the jury;

2. In holding that the order defendant gave plaintiff to jerk harder was not negligent, in conflict with applicable decisions of this Court and other state courts, and the injuries plaintiff sustained were not a result of said order;

3. In holding that under the evidence and the law defendant was not charged with foreseeability that injury might result from the negligent order;

4. In holding that the defendant was following the customary method of pulling ties with spikes driven through them;

5. In holding that there was no causal connection between the negligent order and the injury;

6. In holding that there was no evidence to justify submitting the question to the jury on the issue of the failure of the defendant to furnish plaintiff sufficient help in conflict with applicable decisions of this Court and other Federal and State courts;

7. In holding that defendant did not have to use a safer method than that being used, when it knew of a safer method which was available, in conflict with applicable decisions of other federal courts;

8. In substituting its findings of fact for those of the jury in conflict with other applicable decisions of this Court.

The problems presented are of general public importance and are not limited in effect to the petitioner herein. The effect is nation wide on thousands of railroad employees under the application of the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT.

1. There is sufficient evidence in the record, together with reasonable inferences to be drawn therefrom, to justify the submission of the case to the jury, and the Court has no right to substitute its findings for those of the jury on factual issues.

2. There is ample evidence to submit to the jury the question of the negligent order. The straw boss knew that it ordinarily took four men to pull a tie such as the one mentioned in the evidence and on which two men were working. He had been told that Stone and Fish couldn't pull it. He was directing the men to follow a method, not usual or customary in pulling a tie that was hard to come out, yet he taunted and threatened petitioner in order to get obedience to his order to pull harder, which resulted in injury to petitioner.

3. There is ample evidence from which a jury can find that the defendant should have foreseen that injury might result to petitioner from an order to exert more force than usual and customary, when the usual method of removing ties was not followed. A safer method was known to and available to the defendant, but instead of using the safer method it was attempting to perform a task with two men that it knew ordinarily required four men to perform. The method being used was not the one recommended by the foreman.

4. It was a question for the jury to determine from the evidence whether or not the defendant furnished sufficient help to petitioner to remove the tie in question. The evidence is that defendant had been advised that the two men working (Stone and Fish) couldn't pull the tie; that it ordinarily took four men to do the work; that the foreman had previously directed a method of digging a trench beside the tie, sliding the tie into it and then pulling it

out, and that it ultimately took four men to remove the tie, two pulling, one prying and one hammering on it with a spike maul.

5. The opinion of the Supreme Court of Missouri sets up a different rule with respect to the evidence necessary to make a submissible case on the question of a negligent order from that in the case of Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and Gulf, Colorado & Santa Fe Ry. v. Waterhouse (Texas Civil Appeals), 223 S. W. (2) 654. Furthermore, the opinion of the Missouri Supreme Court sets up a different rule with respect to the duty of an employer to use a safer method of doing work than that set up by the court in the case of Boston & Maine R. v. Meech, 156 F. (2) 109.

In order to maintain harmony among the several jurisdictions, this Court should issue its Writ of Certiorari to review the opinion and evidence in order to resolve the conflict.

ARGUMENT.

This is a petition for a Writ of Certiorari to the Supreme Court of Missouri. As set out in the petition, the suit arises out of injuries sustained by the petitioner while employed by a railroad carrier. Both petitioner and defendant below were engaged in interstate commerce at the time and petitioner's action, therefore, was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59. The defendant is the New York, Chicago & St. Louis Railroad Company.

The statute under which the suit was brought, in pertinent part, is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . ., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . ., for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . ." (45 U. S. C. A. 51).

Plaintiff alleged that his injuries were the result of the negligence of the defendant, and more particularly as the result of a negligent order, coupled with the failure to furnish sufficient help and failure to use a safer method of doing the work which was known and available to the defendant below.

On the trial plaintiff adduced evidence to sustain the above three specifications of negligence and the trial court submitted the questions to the jury under appropriate instructions on each of the foregoing specifications.

A verdict resulted in plaintiff's favor and a judgment was entered thereon. Defendant appealed and the Supreme Court of Missouri reversed the judgment below on

the ground that, as a matter of law, there was not sufficient evidence to warrant its submission.

After unavailing motions by the plaintiff in the Missouri Supreme Court, the court of last resort, the judgment became final.

Within the time allowed by law plaintiff is here seeking a review of the State Court's decision for the causes set out in the "Reasons Relied on for the Allowance of the Writ," and more particularly because the court has arrogated to itself functions that this Court has repeatedly held belong to a jury. The evidence was conflicting, and as shown by the trial judge's submission of the case to the jury and the jury's verdict thereon, opinions of fair minded men differ as to the inferences and conclusions to be drawn from the evidence. This Court has held in Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, that such conflicts are to be resolved by a jury and not determined as a matter of law by a court.

Under the decisions of this Court, what constitutes negligence for the purpose of the Federal Employers' Liability Act is a federal question and the interpretation of what is or is not negligence shall not vary according to the different conceptions of the various state courts. One uniform interpretation shall govern and that interpretation shall be as determined by this Court, and for that reason cases arising under the Federal Employers' Liability Act are subject to the independent review of this Court. Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, l. c. 1294.

The employer's degree of liability is to be determined by a jury using as a guide what it (the jury) believes a reasonable and prudent person would have done under the same circumstances and you so held in the recent case of Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, l. c. 504.

Since this action was brought under the Federal Employers' Liability Act, the special rights there granted to injured railroad workers are not to be taken away by judicial erosion. In appraising a case brought under the Federal Employers' Liability Act, the court must do so with greater care than in other cases so as not to narrow the rights by judicial legislation and encroach upon the functions of the jury. The law in this respect was very aptly stated by Mr. Justice Douglas in his opinion in Bailey v. C. V. Ry., 319 U. S. 350, l. c. 354, 63 S. Ct. 1062, 87 L. Ed. 1444:

> "The right to trial by jury is a 'basic and fundamental feature in our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of Workmen's Compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of their relief which Congress has afforded them."

To the same effect and that courts are not to search the record for conflicting evidence to find against the plaintiff and that juries are to determine conflicting factual issues are the following cases:

> Tiller v. Atlantic Coast Line R., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967;

Bailey v. Vermont Ry., 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444;

Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520;

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916;

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 417, 418, 93 L. Ed. 1282;

Blair v. B. & O., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Louisville & N. R. v. Botts, 173 F. (2) 164, 167.

While the Supreme Court of Missouri has given lip service to the principles of law set forth in these cases, it has totally failed to follow the rules determined by this court, and set out in its opinion, 249 S. W. (2) 442, and contrariwise has construed the evidence in the light most favorable to the defendant. The court, in its opinion, has commented on the evidence, drawn inferences and conclusions therefrom that are unwarranted and not supported by the evidence; it has ignored evidence favorable to the plaintiff, has placed a narrow construction on that evidence favorable to him; and has searched the record with a fine tooth comb for conflicting evidence in order to take the case from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

It stated the rules of this Court which it was required by Urie v. Thompson, supra, to follow, yet in application ignored them and substituted its conclusions and findings for those of the jury, who saw the witnesses and heard their testimony at the time of trial.

I.

The Petitioner Made a Submissible Case.

A.

THE NEGLIGENT ORDER.

1. The Evidence Was Sufficient.

The trial court concluded that the factual issues presented a question for the jury and submitted the case to a jury which returned a verdict in plaintiff's favor. The Supreme Court of Missouri, Division No. 1, decided that the judge and jury were wrong and said the following:

> "* * * But there was absolutely no evidence from which the jury could have inferred that the tie could not have been safely removed by plaintiff, Fish and Stoughton, with plaintiff pulling harder or exerting more force. In other words, there was evidence neither of actual knowledge nor 'foreseeability' that plaintiff might be injured as a result of his compliance with the order" (R. 131).

We respectfully submit that the record evidence is diametrically to the contrary. With all the reasonable and favorable inferences drawn therefrom to which plaintiff is entitled, the evidence is sufficient to support the finding of the jury. And it must be emphasized that in this case the jury found in favor of the plaintiff on the evidence adduced. This verdict cannot be set aside unless there is a complete absence of probative facts to support this conclusion.

The record is clear that the straw boss, Dick Stoughton, had more than nine (9) years experience in track work of this kind and he admitted that he had encountered ties

with spikes driven through them on the very "Y" track where plaintiff was injured (R. 93, 95). Contrast this with the fact that plaintiff had no previous experience with a tie with a spike driven through it (R. 15) and that before Stone was hurt he told Stoughton that with him and Fish pulling, the tie wouldn't come loose (R. 12). Even the foreman, Eugene Slagle, Stoughton's superior realized that Stoughton knew or should have known that a spike was holding the tie because he testified, "They knew something was holding it or it wouldn't pull so hard" (R. 106). He went further and stated that when a tie is hard to pull because a spike is through it, he always told them to push it over and dig the trench deeper (R. 106).

Why would the foreman direct his men to roll the tie over and dig the trench deeper rather than to pull the tie out by brute force if he did not believe an employee might be injured? And when Stoughton disregarded the instructions of his superior, and an employee was injured thereby, he is chargeable with the knowledge of his superior.

Furthermore, Stoughton himself testified that it took four men to remove a tie with a spike in it (R. 97), and yet he was directing Stone and Fish to do this work alone (R. 12, 52, 61). This alone put him on notice that a man might be injured. One must not lose sight of the fact that when Stoughton insisted that Stone pull harder, Stone told him he was pulling as hard as he could (R. 61). Nevertheless, because of the threat and the possibility of losing his job if he refused to pull harder, Stone thereafter gave the tie a pull, a big jerk (R. 52, 61) and pulled too hard (R. 34).

This evidence supports the finding of the jury that Stoughton should have realized that Stone might be hurt if he pulled harder. Stoughton knew that a spike was preventing the tie from being removed. From his ex-

perience he knew that such a tie could not be removed by the brute force of two men, but that four were necessary. His superior, Slagle, had directed the men not to pull such a tie but to roll it over and dig the trench deeper. When Stoughton taunted Stone with the statement that he wasn't pulling hard enough, Stone replied that he was pulling as hard as he could. It was **after** this that Stone, at Stoughton's direction, gave the jerk that caused his injury.

When the tie wouldn't move with two men pulling on it, and still wouldn't budge when Stoughton pried on it, there is certainly evidence from which a jury could infer that Stoughton should have anticipated that Stone might well over-exert himself and sustain an injury when he commanded him thereafter to pull—pull harder. A master can't be oblivious to all the surrounding circumstances and conditions in ordering his men to over-exert themselves and then be absolved from responsibility because he couldn't anticipate the consequences of his acts. This is especially true here where the means of knowledge was at hand.

In the following cases brought under the statute here in question, evidence relating to orders such as was given here, was held to make a jury question:

Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Williams v. Terminal R. (Mo. App.), 20 S. W. (2) 584, 596;

C. R. I. & P. Ry. v. Cline, 91 Colo. 255, 14 P. (2) 495;

P. A. W. R. Co. v. Tomas (9th Cir.), 36 F. (2) 210;

Schirra v. Delaware L. & W. R., 103 F. Supp. 812.

The Missouri Supreme Court would distinguish these cases on the ground that there was no hazard that Stoughton should be required to have foreseen when he gave the

order. In making such a finding (R. 134) the Court arrogated to itself the function of the jury. It is for the jury to determine whether, under this evidence, and the reasonable inferences to be drawn therefrom, Stoughton should have foreseen the hazard to the plaintiff.

We next direct your attention to the order to Stone to pull harder and examine the law with respect to it.

2. The Opinion Conflicts With That of Other Jurisdictions.

The holding of the Missouri Supreme Court in the case at bar is in conflict with the case of Gulf, Colorado & Santa Fe Ry. v. Waterhouse, decided under the Federal Employers' Liability Act by the Texas Court of Civil Appeals, 223 S. W. (2) 654, 660, and Blair v. B. & O. R., 323 U. S. 600, 65 Sup. Ct. 545, 89 L. Ed. 490. The courts there construed negligent orders and the evidence supporting them.

In the Waterhouse case the court held the plaintiff made a submissible case, and that holding applies with equal force to the case at bar. In this case the plaintiff suffered a heat stroke after being ordered back to work by his foreman. He had complained to his foreman of feeling too hot, and in spite of his protest, the foreman sent him back to work. In holding that Waterhouse was entitled to recover the Texas Court said that the first order given to Waterhouse to do the work was not negligent, because the foreman had not set the pace of the work, but that after Waterhouse registered his protest about continuing the work, the foreman's subsequent order to work was a negligent one.

From this it is apparent that the reason the first direction to Waterhouse was not a negligent one was because he was free to do the work as he pleased and was not required to do the work in any particular manner.

This applies with equal weight here. When Stone protested that he was pulling as hard as he could, Stoughton was put on notice that Stone was then exerting as much force as he could. Any further exertion would amount to over-exertion and Stoughton should anticipate that Stone might be injured thereby. And when Stoughton, thereafter, directed Stone to pull harder he did so in the face of Stone's protest that he was pulling as hard as he could.

Just look at the evidence.

When Stone and Fish attempted to remove the tie and encountered difficulty, they informed the straw boss, Dick Stoughton. He immediately accused Stone of not trying and said he wasn't pulling hard enough (R. 12, 52, 61). Stone then told him he was pulling as hard as he could (R. 61). Stone asked that the rail be jacked a little higher (R. 50) and Stoughton gave it a little more jack (R. 51). Then Stoughton took a bar and pried on the end of the tie (R. 12, 51, 61). Stoughton again directed Stone to pull harder. Stoughton claimed they weren't pulling hard enough and Stoughton and Stone got into a heated exchange of words (R. 52).

The testimony of the witnesses concerning this order is as follows:

Prock Stone:

"A. Well, we were—I practically maybe took hold of the tongs and pulled it myself, I don't know for sure, anyway I know Fish had to get on the tie with me, Larry Fish, and we both couldn't pull it and Stoughton was around some where, we asked him, we told him about the tie, it was hard to come out or something, so he picks up a bar, walks over to the other end, maybe, he says to me, you are not

trying. You ain't pulling hard enough. So he puts the tie, fixed a bar under the end of the tie, he got a prizen hold over the rail and give us a lift. We give a pull and it wouldn't come, and he said, you are not pulling, if you can't pull that tie, I will get somebody on both tongs that can. That is the words he said to me.

Q. Then what did you do? A. Well, we both got back down and give a hard pull with him a prying and I hurt my back (R. 12).

Q. Why did you pull it out as you did? A. I was told to" (R. 15).

Lloyd Fish testified:

"Q. What was the occasion for doubling up? A. It wouldn't move.

Q. I see. Now go ahead and tell what happened. A. Well, so we doubled up and the tie wouldn't come. We would jerk it, it might move an inch I would say at a time, and Mr. Stone asked for more jack (R. 50).

Q. All right, then what happened? A. We still couldn't pull it (R. 51).

Q. Tell us what happened, Mr. Fish. A. Well, Dick claimed we wasn't pulling hard enough, and, oh, they kind of got into it back and forth . . . Dick said, he wasn't pulling hard enough, if he couldn't pull to get to hell off of it and he would get somebody that would.

Q. Then what did Mr. Stone do, and what did you do? A. We give it another pull. That is when Stone quit and said he hurt his back" (R. 52).

Charles Hopkins:

"A. . . . Mr. Fish and Mr. Prock (Stone) were pullling and Dick come up and started helping. **He told Mr. Stone to pull harder. Mr. Stone told him he was pulling as hard as he could.** Mr. Stoughton said, 'If

you can't pull any harder I will get somebody that will' and they got down and Mr. Stoughton got a bar and started hitting it, trying to push it out, to push the tie out, and it went on, and Mr. Stone got down, him and Mr. Fish and they pulled pretty hard on the tie and they jerked it. Mr. Stone stepped back off the tongs and raised up about half way and said, 'I hurt my back,' and started walking up the track . . . " (R. 61).

These facts certainly come within the Waterhouse case. Stoughton had nine years of track experience and knew the problems and consequences connected with removing a tie with a spike driven through it into the ground. He saw the difficulty Stone and Fish were having and accused Stone of not trying. He knew that it took at least four men to pull that tie out. Stone then protested that he was pulling as hard as he could. Thereafter, Stoughton pried on the tie and when it wouldn't come loose he again taunted Stone by saying he wasn't pulling hard enough, if he couldn't pull to get the hell off and he would get somebody that would. It was after Stone's protest and Stoughton's subsequent direction to pull harder that Stone was injured.

After Stoughton saw the difficulty the men were having and after Stone protested that he was pulling as hard as he could, didn't Stoughton then set the pace of the work by taunting Stone to pull harder or he would replace him with someone that would?

Wasn't it negligent for him to direct two men to pull that tie out when he knew it required four men?

We believe in the light of the Waterhouse case there can be no question but that Stone made a submissible case and that the defendant is liable for giving the negligent order.

What was said by the Court in the Waterhouse case applies with equal weight to the case at bar. It is as follows, l. c. 661:

> "* * * The jury were authorized to find that the foreman's order to plaintiff to return to work after plaintiff complained to him, was a legal cause of plaintiff's injury, as they necessarily did under issue 9 . . . . Plaintiff's obedience to the order was not an intervening act of an independent agency as a matter of law, **but the immediate, intended and expected consequence of the foreman's order. It cannot be said that plaintiff knew that he would be injured if he went back to work.** Since the order was a legal cause of the servant's injuries, this was enough to make the defendant liable under the Federal Employers' Liability Act * * *" (Emphasis ours.)

In attempting to distinguish the Stone and Waterhouse cases, the Missouri Supreme Court said:

> "Furthermore, the Waterhouse case is distinguishable in that plaintiff, unlike Waterhouse made no protest against working when he was not in physical condition * * *" (R. 134).

When Stoughton directed Stone to pull harder and Stone replied that "he was pulling as hard as he could" (R. 61), didn't that signify that his physical ability had been reached and anything beyond would be overtaxing his physical condition and ability? The jury was certainly entitled to draw this inference.

We submit that the Missouri Supreme Court's attempted distinction of this case is one without a difference.

The Missouri Court's opinion is in conflict with the rule announced in the case of Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 549, 89 L. Ed. 490, wherein this Court held that a submissible case was made under the Federal Employers'

Liability Act by a railroad employee injured while unloading steel tubes from a railroad car under direction of a foreman to do the work or they "would get somebody else that would." In that opinion it was stated, l. c. 547:

> "* * * we cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury, in whole or in part. Consequently we think the jury, and not the court, should finally determine these issues."

The opinion of the Missouri Supreme Court in the case at bar is in conflict with that of the Texas Court of Civil Appeals and with opinions of this Court and provides a different rule with respect to the sufficiency of evidence necessary to make a jury case under the Federal Employers' Liability Act.

The decisions of the United States Supreme Court have consistently held that a uniform rule must be followed in **all states** in determining the amount of evidence necessary to make a case under the Federal Employers' Liability Act and that it is not subject to the control of the several states. The following cases support this rule of law:

Brown v. Western R. of Ala., 338 U. S. 294, 295, 70 S. Ct. 105, 94 L. Ed. 100;

Brady v. Southern Ry., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

The order of the straw boss, Dick Stoughton, to "pull harder or get the hell off of it and he would get somebody that would," viewed in the light of the above cases, leaves no doubt but that a submissible case was made under the negligent order theory and that the opinion of the Missouri Supreme Court with respect to the evidence necessary to make a submissible case under the Federal Employers' Liability Act is in conflict with the rule set forth by courts

of other states and by this Court. The evidence shows without a doubt that Stone's injuries were caused, at least in part, by defendant's negligence.

B.

THE FAILURE TO FURNISH SUFFICIENT HELP.

Division No. 1 of the Missouri Supreme Court found that:

> "The issue (furnishing sufficient help) was not submissible in the instant case because there is no evidence whatever from which it could be inferred that the number furnished was not sufficient to enable the workman or workmen to do the work with reasonable safety" (R. 134, 135).

Let's look at the record to determine whether or not the evidence adduced supports the jury's verdict on this question. At the time plaintiff was injured he and Lloyd Fish were pulling on the tie. There is also evidence that Dick Stoughton had assisted by attempting to pry on the tie with a pinch bar. But the evidence is not entirely clear that Stoughton was so prying at the time that Stone and Fish gave the big jerk which resulted in Stone's injury (R. 51, 52, 61).

The record is crystal clear that four men were required to remove a tie with a spike in it. The strongest evidence on this point is the statement of defendant's own witness, Dick Stoughton, who testified that:

> "Q. And two men with the help from somebody on the end prying and somebody else can't pull one of those ties out with a spike in it? A. **No**, it is awful hard" (R. 97).

The evidence is further undisputed that when the tie was removed it took four men to remove it, Fish and Hop-

kins pulling and Stoughton prying and Bailey driving the tie with a spike maul (R. 53, 54, 61).

Moreover, the foreman on the job, Stoughton's superior, Eugene Slagle, testified that he had directed the men not to pull on a tie that was hard to get out, but that they should roll the tie over and dig the trench deeper (R. 106, 107).

In reviewing this evidence, it is essential to remember that the plaintiff is entitled to the most favorable construction that can be placed on the evidence and all reasonable inferences to be drawn therefrom. The Supreme Court of Missouri in its opinion attempted to color the evidence by its comment that three men could do the work, but the most favorable evidence to the plaintiff is that four men were required to do it and this was so testified to by defendant's own witness, Dick Stoughton. The evidence is that only Stone and Fish were pulling on the tie at the time Stone was hurt. Although there is evidence that Stoughton did attempt to assist by prying on the tie there is a conflict in the evidence as to whether or not he was doing so at the precise time he directed Stone and Fish to pull harder. Under these circumstances the jury had a right to infer from the evidence that only two men were attempting to extricate the tie at the time when Stone was injured.

The record is likewise clear that it required at least four men to remove a tie with a spike through it by pulling on it (R. 97). Stone's protest to Stoughton that he and Fish were not able to pull the tie out, squared with Stoughton's own admission that it took four men to remove such a tie, creates a submissible jury question.

The final outcome of the jerk made by Stone, which resulted in his injury, is sufficient evidence for the jury to

conclude that the men furnished could not perform the task under the circumstances then and there existing and that more help should have been furnished. It is for a jury, not the court, to draw all reasonable deductions and inferences from the evidence, whether the evidence be direct or circumstantial. Under the evidence adduced here, it is clear that the defendant did not furnish sufficient help. The following cases support petitioner's contention:

Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 547, 89 L. Ed. 490;
Robak v. Pennsylvania R. Co., 178 F. (2) 485;
Chesapeake & Ohio v. Winder, 23 F. (2) 794.

The court in its opinion further found that there was no evidence that:

> "* * * in the pull plaintiff made after the order and in which he wrenched his back, he exerted more strength than ordinarily necessary . . . Plaintiff admits that he did not comply with the order by pulling any harder than he usually did. By his own admission fixing the amount of energy he actually used, the order did not cause plaintiff to over-exert himself and, hence, did not cause his injuries" (R. 137).

This is an unwarranted conclusion of the court based upon an extremely narrow and erroneous construction of the evidence and a construction most detrimental to the plaintiff. The finding is not supported by the evidence.

This finding is based on the following evidence:

> "Q. Directing your attention to your statement a moment ago that you jerked on the tie, Mr. Stoughton told you to jerk harder on the tie or he would get someone who would; I will ask you whether or not the jerk that you and Fish made on the tie was ordinarily enough to pull a tie out? A. Yes, sir, it was" (R. 15).

The court has certainly misinterpreted the meaning of this reply and has placed the most narrow construction possible on it. Stone merely stated that the force he exerted in response to the order was ordinarily sufficient to pull a tie out that did not have a spike driven through it into the ground. Nowhere did he say he did not exert more force than usual in pulling this tie with a spike through it, and the record is entirely void of any admission on the part of Stone that he didn't pull harder. The court has failed to point out such an admission and its finding is a conclusion not based on evidence which invades the province of the jury. It is an interpolation made to support its act of reversal of the judgment.

The court has ignored the testimony that **after** Stoughton told Stone he "was not pulling hard enough" (R. 12, 52) he commanded him to pull **harder** or he would get someone that would (R. 12, 52, 61). Thereafter Stone gave a **big jerk** (R. 52, 61) in response to this command. Stone himself testified that he would never pull that hard on a tie again (R. 12, 44).

Since the plaintiff is entitled to the most favorable construction to be placed on the evidence, isn't it reasonable for the jury to infer that if Staughton complained that Stone wasn't pulling hard enough and then commanded him to "pull harder" that Stone would obey that command and exert still more physical force to remove the tie? The very fact that Stone and Fish **jerked** the tie has a definite meaning, and Stone's statement that he would never pull that **hard** again certainly negatives any idea that he didn't exert an additional amount of strength.

Furthermore, the evidence elicited by defendant on cross-examination emphasizes the fact that Stone **pulled too hard** (R. 34). If a man says he is pulling as hard as he can and after being commanded to pull harder, he does so, and then complains of having pulled too hard, could the

jury reach any other conclusion but that he, Stone, exerted more force than he had previously done in response to that command?

Just what does the word "jerk" signify to the average person? What does this word denote to a jury of twelve men chosen to find the facts? Doesn't that word itself signify some additional, hard, unusual exertion of strength? Under any view there is sufficient conflict to make a submissible jury question.

In view of all this evidence and the rule that the plaintiff is entitled to the most favorable construction of and the inferences from that evidence, it is clear that the evidence here is sufficient to support the issue that the defendant failed to furnish sufficient help to the plaintiff. In this case the jury has determined by its verdict that the help furnished plaintiff was insufficient and that the plaintiff over-exerted himself in compliance with the order to "pull harder." Since the jury is the one to resolve conflicts and since there is a conflict in the evidence, an appellate court has no right to substitute its findings for those of the constitutional tribunal appointed by Congress to decide these factual issues.

II.

The Holding by the Missouri Supreme Court That a Safer Method Known and Available Need Not Be Employed by the Defendant Is in Conflict With the Rule in the Case of Boston & Maine R. v. Meech, 156 F. (2) 109 (First Circuit).

The court has said that:

> "The undisputed evidence was that, at the time he gave the order, Stoughton and his crew were following the regular and usual method of getting out a tie hard to remove . . . ." (R. 135).

This finding is based entirely on the court's own conclusion and is contrary to the evidence.

What were the customary and usual methods available to remove a tie with a spike through it?

A) To pull the tie with brute force with the use of four men pulling. This method was testified to and admitted by defendant's witness, Stoughton (R. 97). But was not recommended by the foreman, Slagle (R. 106, 107).

B) Roll the tie over and dig the trench deeper. This is the method that the foreman, Eugene Slagle, directed his men to use whenever they encountered a tie that was hard to remove, and Dick Stoughton disobeyed this direction of his foreman in commanding Stone to pull harder.

Eugene Slagle testified:

"Q. . . . How many men does it take to pull them out ordinarily? A. Well, they don't know they are in there until they get the tie out. **If they pull hard I have always told them to push it back over and dig their trench deeper.**

Q. If they pull it out it takes more than two men, it takes three or four men, does it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, it would drop down lower and then they could pull it out easy (R. 106).

A. . . . it would be very foolish to go to all that work (removing spikes and jacking up rail) just to get the rail up **when you could dig the trench deeper and take the tie out that way**". (R. 107).

Stone himself testified to this method (R. 14, 15).

Lloyd Fish testified:

"Q. How do you generally handle that, a tie that won't come out that way because it has a spike in it?

A. You most generally dig a ditch alongside of it and deeper, kind of a V shape, and let that spike not hit anything.

Q. You would turn the tie over, is that it? A. We could turn it sideways if the ditch is deep enough" (R. 58).

Hopkins also testified to this method (R. 63).

The evidence is clear that the customary method to remove a tie with a spike driven through it was to use **four** men to pull it out, and not two as was being done at the time Stone was injured. In fact, Slagle, the foreman, did not recommend pulling the tie with four men, but directed his men to follow the customary method of digging the ditch alongside the tie deeper and then rolling the tie into that ditch. Apparently Slagle thought the method of pulling the tie out by brute strength was unsafe, otherwise he would not have recommended against that method, and the jury was entitled to make that inference from the evidence. In any event, it is clear that the usual and customary method was not being employed at the time petitioner was injured.

However, a still safer method than those mentioned above was known to the defendant. This safer method consisted of pulling the spikes out of the ties for half a rail length on either side of the tie sought to be removed, thus freeing the rail from the ties, and then jacking the rails up high enough to free the tie to be removed so that the tie and spike would be free to come out. The testimony of the method was as follows:

Lloyd Fish:

"Q. Now, could you have jacked the rails up high enough to free that tie? A. The only way we could have done that would have been to drop it and pull the

spikes out of the other ties next to it, oh I would say a half a rail length, and just raise the rail alone.

Q. By doing it that way, would that have freed the tie from the rails? A. It would have (R. 53).

Q. By doing that, I will ask you to state whether or not that tie could have been pulled out by one man? A. I would say it would have took two men to pull it out with the rails off of it to get it out from under there" (R. 58).

Buster Hopkins:

"Q. How could you have raised the rails then high enough to free it? A. Well, you could lift the track back down, pull the spikes out about half a rail length forward, and then half back, and raise it up far enough to leave the tie come up and pull it out.

Q. Would that take a little more time? A. Yes, it would.

Q. But the tie would then be free, would it? A. Yes, the tie would be free.

Q. Then how many men could pull it? A. Two" (R. 63, 64).

Dick Stoughton admitted this method would be safer. He testified:

"Q. Couldn't you loosen the spikes a few ties down and lift the rail free of the ties?

* * * * * * * *

A. It could be done.

Q. And it would be safer where you are trying to pull a tie out that is hard to pull?

* * * * * * * *

Q. Well, I know it would (take longer) but it would be a lot safer, wouldn't it? A. Yes, sir" (R. 96).

We thus say that there is sufficient evidence on which the jury could infer that the method being used at the

time Stone was hurt was not a reasonably safe one and there is further evidence of a safer method known to the defendant at the time and available to it, which could have been used.

The Supreme Court of Missouri ruled as a matter of law that this safer method need not be followed because that would set up a higher standard than reasonable care (R. 136). We submit that this ruling by the Missouri Court is in conflict with the holding in the case of Boston & Maine R. Co. v. Meech, 156 F. (2) 109, certiorari denied 329 U. S. 763, and this conflict should be reconciled by this Court.

The Missouri Court tried to constrict the limits of that decision and distinguish it from this case on the ground that it applied only to a safe place to work, or the operation of a locomotive. We fail to see this narrow limitation and submit that the principle of law announced by the First Circuit was not so narrowly stated.

In the Meech case the court specifically pointed out that the accident could possibly have been prevented by placing another man on the locomotive to look out for employees along the track or could have sounded a whistle. In referring to the negligent operation of the engine and what precautions **might** have been taken to avoid the accident, that court said, l. c. 111:

> "* * * if is clear that although **some** precautions were taken for decedent's safety, **further** precautions were possible. * * *." (Emphasis ours.)

The holding in the Meech case applies with equal weight to the case at bar. Additional precautions were possible—a safer method of removing the tie could have been employed. In fact, the section foreman had directed the use of a different—a safer—method from that used.

Plaintiff is entitled to all the favorable inferences from the evidence, and the evidence is sufficient for the jury to determine that the method being used was both inadequate and unsafe.

There was ample evidence of a safer method to be used. Instead of pulling the tie by force the spikes could have been removed from the ties on each side of the one being removed, and then the rail could have been jacked high enough to free this tie (R. 53, 57, 58, 63, 64). Stoughton admitted that this would be safer (R. 256).

Rather than construe the evidence and all favorable inferences therefrom in plaintiff's favor, the Missouri Court has substituted its findings for those of the jury and concluded that the method suggested would slow up defendant's operations and set up higher standards of conduct and require a duty of absolute safety (R. 136). The Court has narrowly construed the evidence in spite of the emphasis in recent decisions of this Court that the scope of jury inferences in cases under the Federal Employers' Liability Act must be liberally and not narrowly or stultifyingly reviewed. Terminal R. Assn. of St. Louis v. Howell, 165 F. (2) 135.

Under the law as announced in Urie v. Thompson, supra, the Court is required to place the most favorable construction on the evidence in plaintiff's favor, and not to argue the matter; it is for the jury to determine whether the method used was unsafe, and if so, whether the method suggested was safer, available and reasonable to use.

The Missouri Court's opinion is more of an argument of the facts to justify its reversal of the jury's finding than a statement of what the evidence showed. It is clearly a substitution of its findings for those of the jury.

CONCLUSION.

Petitioner respectfully submits that the record evidence clearly justifies a submission to the jury of the question of the negligent order, the safer method and the sufficiency of the help furnished. Furthermore, the opinion of the Missouri Court is in conflict with and sets up rules in direct opposition to the holdings of the United States Supreme Court and other State and Federal courts construing rights afforded to railroad workers under the Federal Employers' Liability Act.

Wherefore, your petitioner prays this Court to issue its Writ of Certiorari to the Supreme Court of Missouri so that the record can be reviewed and the judgment of that Court reversed and the judgment of the trial court reinstated so that harmony may be obtained and the right to trial by jury preserved to litigants under the Federal Employers' Liability Act.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PROCK STONE,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.
No. 320.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF FOR PETITIONER.

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SUBJECT INDEX.

Cases Cited.

Constitution and Statutes Cited.

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REPLY BRIEF FOR PETITIONER.

Respondent devotes the major portion of its brief to a constitutional question of jurisdiction which has been well established and frequently adjudicated by this Court in FELA cases. It is apparent that respondent has not fully explored the law with respect to this. Authority for this Court's jurisdiction in the case at bar and its right to review state court decisions under the FELA are so numerous and so recent that petitioner considers it strained optimism on respondent's part to expect this Court to

reverse the line of cases adhering to the principle. The treatment of this jurisdictional question is of minor importance to the real issues, and we treat it accordingly herein.

The real issues are stated in petitioner's application for certiorari and the brief which accompanied it (pp. 8-22, inclusive) (pp. 26, 27 and 28 of the brief). We briefly summarize those questions here:

1. Can the Missouri Supreme Court substitute its findings of fact for those of the jury?

2. Is the Missouri Supreme Court's opinion with respect to the negligent order in conflict with the opinion of this Court in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and the opinion of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe R. v. Waterhouse, 223 S. W. (2) 65 660?

3. Is the Missouri Supreme Court's decision and opinion in ruling, as a matter of law, that a safer method of work need not be followed in conflict with the decision and opinion of the First Circuit Court of Appeals in Boston & Me. R. v. Meech, 156 F. (2) 109?

STATEMENT.

Respondent has challenged the accuracy of petitioner's statement of the facts. Petitioner accepts this challenge and discusses the facts in the order followed by respondent in its brief at pages 1-3.

1. Respondent first challenges the inference drawn from the evidence that it had knowledge of the spike in the tie extending into the ground contained in petitioner's statement of the evidence. The evidence for such inference is as follows:

Dick Stoughton, the straw boss, testified that he had encountered several ties with spikes in them on the very "y'l where petitioner was injured (R. 93, 95); the section foreman, E. gene Slagle, testified that "they knew some-th.. g was holding it or it wouldn't pull so hard" (R. 106). This testimony from experienced railroad men, and the inference which the jury was entitled to draw from it, is sufficient for the jury to find that respondent knew, or should have known, that a spike was holding the tie and it certainly warrants the statement petitioner made.

2. Next respondent states that there is no evidence that the efforts of four men were required to pull a tie with a spike in it.

We direct the Court's attention to Record 97 where this question and answer appears:

> "Q. And two men without help from somebody on the end prying and somebody else can't pull out one of these ties with a spike in them, can they? A. No, it is awful hard."

We suggest that whether this is impeaching or not, the question and answer appears in the record, and it is a proper basis for a statement and certainly sufficient evidence from which the jury could find that four men were necessary to pull the tie. The above evidence is clear that it required **two** men pulling and the help of **another** man prying and the help of **somebody** else to remove such a tie; a total of **four** men.

3. Petitioner stated on page 3 that "despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he (the straw boss) ordered plaintiff to pull harder" (R. 12, 51, 52, 61). Contrary to respondent's statement that petitioner's attorneys will wish to correct this, we reiterate

this statement because it is supported by the evidence and a jury has a right and did find it as a fact.

In sub-paragraph (b) respondent says that the reference to "it required four men" is a reference to the number of men finally required to draw the stubborn tie. This is incorrect. We are not referring to the evidence that four men eventually pulled the tie in question, but to the evidence of Dick Stoughton that it ordinarily required four men to pull a stubborn tie with a spike in it (R. 97).

In sub-paragraph (c) respondent charges to be false the implication drawn from the evidence that only two men were employed in extracting the tie at the time Stone was injured. The implication is not false and is one the jury was entitled to make from all of the evidence.

The evidence showed that Stoughton (the straw boss) came to assist Stone and Fish in removing the tie, but the evidence is not clear that Stoughton was assisting at the precise time the petitioner gave the jerk. We direct the Court's attention to the testimony of Mr. Fish at Record 51, which is as follows:

> "Mr. Stone asked for more jack and we couldn't give it any more, had it high enough then, and so we doubled up and Dick come down with a bar and put it over the south rail and pried on the other end and bumped it as we jerked and it still wouldn't come. **So Prock and I give it a big jerk, that is when he quit and said he hurt his back.**" (Emphasis ours.)

While it is clear that Stoughton had assisted in the removal of the tie by hammering on it, it is not clear that he was hammering at the precise time the petitioner and Fish jerked the tie in response to Stoughton's order which resulted in Stone's injury. Would not the jury be justified from this evidence in finding that Stoughton had stopped prying prior to the time Fish and Stone gave the jerk

and that at the time Stone was hurt only he and Fish were pulling on this tie?

In addition to this, the testimony of Charles Hopkins at Record 61 implements the evidence that although Stoughton had been assisting in the removal of the tie by prying prior to the time Stone was hurt, he was not prying on it at the precise time Stone jerked it.

It is the province of the jury to take all of the evidence, not one particular statement, and draw all reasonable inferences and deductions from it. With this evidence in the record, we submit it is incorrect to say that a statement based on it is false.

4. Respondent challenges the statement at page 3 that there was sufficient evidence for the jury to find that only two men were pulling at the precise time Stone was hurt. Respondent says that this is untrue, because Stone himself testified contrariwise.

We heretofore stated that the evidence with respect to this was not clear, but we say that it is the jury's province to make this finding from all the evidence and particularly that evidence adduced from Mr. Fish and Mr. Hopkins (R. 51, 52, 61). This has been discussed in point 3 immediately above.

5. We stated that the evidence also showed that the straw boss (Stoughton) had encountered several ties with spikes in them on this particular "Y". Respondent charges the petitioner with using the pluperfect tense of the verb in order to imply that Stoughton had encountered several ties with spikes in them on the "Y" prior to the time Stone was hurt.

The jury could infer this from the evidence and we think it is more clearly established by the reluctant witness, Stoughton, when he stated that on two or three occa-

sions they encountered ties with spikes in them on the north "Y" and further stated that if Stone was hurt on the "Y" it was about the time of his injury that the ties with spikes in them were encountered (R. 93, 95). So, therefore, since Stone was injured and did not thereafter pull any other ties with spikes in them there is a reasonable inference that the ties with spikes in them, referred to by Stoughton, were encountered prior to the time of the fatal injury to Stone.

6. Respondent seeks to escape the binding effect of Eugene Slagle's testimony that "they knew something was holding the tie because it pulled so hard" (R. 106), because he was not present.

Petitioner states that it makes no difference whether Slagle was in the vicinity or not. The testimony referred to was given by Slagle and was based on his many years of railroad experience. If, from his experience, he could say that under the circumstances where the tie pulled so hard the men "knew something was holding the tie", then that knowledge on his part is binding on the respondent. If track men with experience should realize that a tie that pulls hard might have a spike in it, then that is sufficient evidence for the jury to infer knowledge on the part of the respondent and find that with that knowledge the respondent and its straw bosses should have foreseen that the petitioner might be injured as a result of his compliance with an order to pull harder.

Thus we submit that since the jury resolved the question of fact in petitioner's favor, we are entitled to take the most favorable view of it in the statement of facts here.

ARGUMENT.

A SUBMISSIBLE CASE.

Negligent Order.

The respondent raises a question in its brief with respect to the negligent order not decided by the Supreme Court of Missouri. It would not be necessary to reply to its argument except for the fact that it is misleading.

Respondent's argument on this point is premised upon a discussion of the instructions and what the jury found guided by them. However, the Missouri Supreme Court did not pass on the instructions but based its decision on the fact that no submissible case was made. In the third paragraph of the Missouri Supreme Court's opinion, it said that:

> "Defendant's first assignment is that the trial court erred in failing to sustain its motion for a directed verdict. As we have concluded that plaintiff did not make **a submissible case under the Act**, we need not rule the other matters briefed and argued here" (R. 125). (Emphasis ours.)

It is apparent that the question presented here is whether or not the evidence is sufficient to make a submissible case under the Federal Employers' Liability Act and not a question as to the propriety of the instructions or findings made pursuant thereto.

What the Missouri Supreme Court said was that there was not sufficient evidence to submit the case to the jury, but that a directed verdict should have been sustained. The trial court thought otherwise and submitted it to the jury. The jury found in favor of the plaintiff, but on review of the evidence by the Supreme Court of Missouri,

it substituted its inferences, deductions and conclusions from the evidence in order to reach its decision and judgment that the evidence was not sufficient to make a submissible case and that a directed verdict should have been sustained.

We pointed out in our brief the error in doing this, and there is no further necessity for reviewing the many decisions by this Court holding that where there is any evidence whatever from which a jury could draw inferences, even speculation to some degree, it must be submitted to the jury and not taken away by an appellate court.

We submit, therefore, that the respondent has missed the point entirely and has argued the sufficiency of the instructions given rather than the sufficiency of the evidence.

We submit that under the decision of this Court in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and under the decision of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe R. v. Waterhouse, 223 S. W. (2) 654, petitioner made a submissible case under the negligent order theory, and a directed verdict is not warranted.

Failure to Furnish Sufficient Help.

The Missouri Supreme Court said that there was not sufficient evidence to justify a submission of the question of sufficient help to the jury. Petitioner insists that there is sufficient evidence and that this Court has a right to review the Missouri Supreme Court's opinion and decision to determine whether or not there was sufficient evidence to warrant submitting it to the jury. In fact, it is charged with the duty of assuring the Act's authority in state courts, and when the state's jury system requires the court (Supreme Court of Missouri) to determine the sufficiency

of the evidence to support a finding of fact based on a federal statute, the correctness of its ruling is a federal question over which the Supreme Court of the United States has control. Brady v. Southern Ry., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

Respondent has further charged herein that three men and not two men were assisting in extricating the tie. It has already been shown in the discussion under the factual statement, point 3 (c), that the inference is that only two men were employed. The entire point with respect to the failure to furnish sufficient help has been thoroughly discussed in petitioner's original brief at pages 42-46.

Safer Method.

The argument of respondent with respect to this point is primarily one of law.

There is, however, one implication raised by respondent on page 22 of its brief which we wish to correct. Respondent contends that under petitioner's theory the safest method must be used, that is, an absolute safe method. The only thing that petitioner has said was that if a safer method were available, it should be used, and this is supported by the cases.

Respondent does not sufficiently distinguish the case of Boston & Me. R. v. Meech, 156 F. (2) 109, on which petitioner relies, but attempts to dismiss the matter by saying that it is confident that there is no authority which would dispense with the finding that the method used was not reasonably safe.

The Supreme Court of Missouri held that respondent was not required to use a safer method and that to require it to do so would set up higher standards than reasonable care (R. 136). This is in conflict with the decision of the

First Circuit Court of Appeals in the Meech case, supra, and both the evidence and the law were fully discussed by petitioner in his brief at pages 42-51.

In passing, we also refer this Court to the opinion of the District Court for the Eastern District of Pennsylvania in the case of Rothwell v. Pennsylvania R., 87 F. Supp. 706, l. c. 708, in which that court followed the Meech case and held that an instruction given to a jury to the effect that the failure to adopt a safer method, where it is available, **is evidence of negligence**, was not error, and the court said that the principle was well established in law.

THIS COURT HAS JURISDICTION.

The respondent has attempted to side step the real issues presented here by questioning the right of this Court to grant the relief sought for lack of jurisdiction. What respondent really wants this Court to do is to reverse a long line of prior decisions in which it has held that it has authority to review state appellate courts' actions in construing and deciding FELA cases.

The crux of respondent's entire argument advanced herein is that this Court has no constitutional authority to review the decision of the Missouri Supreme Court in the case at bar. It has based its argument on the premise that the right to a trial by jury under the Seventh Amendment to the Constitution of the United States is not applicable to state courts. Therefore, respondent argues, if a litigant in the state court of Missouri is not entitled to a jury trial as a matter of right under the Seventh Amendment, the United States Supreme Court has no authority to review an opinion and decision of the Missouri Supreme Court setting aside a jury verdict and taking that verdict away.

The judicial system of Missouri provides for jury trials to litigants in negligence cases [Constitution of Missouri, Article I, Section 22 (a)]. The courts of Missouri must accept suits brought under the FELA and accord to injured railroad workers the same rights afforded other litigants in negligence cases (45 U. S. C. A. 56; Miles v. Ill. Cent. RR., 315 U. S. 698, 62 S. Ct. 827). Since the Constitution of the State of Missouri gives litigants in FELA cases a right to a jury trial, it is immaterial whether or not that same right is given under the Seventh Amendment to the Constitution of the United States.

The crux of the problem then is whether this Court has the right to review the opinion and decision of the Missouri Supreme Court in the case at bar and not whether the Seventh Amendment guarantees a jury trial in state courts.

This Court has repeatedly held that it has a right to review the opinions of the state appellate courts deciding cases under the FELA to determine whether the evidence of negligence in the record is sufficient to justify a submission of the case to the jury. This Court has stated that not only is it authorized to do so, but it is charged with the duty to do so under the supremacy clause of the Constitution, Article VI. It has so held in many cases.

Brady v. Southern Ry., 320 U. S. 476, l. c. 479, 64 S. Ct. 232, 88 L. Ed. 239;

Dice v. Akron, Canton & Youngstown R., 72 S. Ct. 312 (decided February 4, 1952);

Ellis v. Union Pac. R., 329 U. S. 649, 67 S. Ct. 598;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Bailey v. Central Vermont R., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

Therefore, respondent's argument that this Court has no right to review state court opinions in FELA cases is not well taken.

Respondent's argument on pages 12 and 13 of its brief that the only function of the Supreme Court is to define negligence as used in the Federal Employers' Liability Act, but does not have authority to review the state court's rulings, deciding whether the facts are sufficient to constitute negligence, is specious in view of the decided cases mentioned above.

Furthermore, respondent's argument on page 13 of its brief is contradicting. Respondent has argued throughout that this Court has no right to review the action of a state appellate court in FELA cases with respect to the amount of evidence necessary to make a submissible case. Yet, we find that on page 13 of its brief it admits that if a finding is unsupported by credible evidence this Court is not bound to accept it, for such finding would be without due process of law. If this Court is not required to accept a finding unsupported by credible evidence and may review a state appellate court's decision, therefore, the contrary is certainly true. If the jury's verdict is supported by credible evidence this Court has a right to review the action of a state appellate court setting aside that verdict and substituting its own finding, deductions and conclusions which are not supported by the evidence.

On page 14 of its brief respondent argues that even if under Missouri's system of jurisprudence the appellate courts (in this instance the Supreme Court of Missouri) usurp the functions of the jury, it is a question of local procedure to be decided by the state judiciary, and further states that this Court is bound by the Missouri Supreme Court's findings of fact. It is apparent that respondent fails to take notice of the difference between substance and procedure. This Court has frequently held that the

rights accorded litigants under the FELA are substantive rights and not to be taken away. Respondent has also ignored your recent holding in the Dice case, supra, wherein an argument similar to the one at bar was advanced, and you held, l. c. 315, that:

> "* * * the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."

We submit that in the Dice opinion you came close to holding that regardless of the system of jurisprudence established by the state under FELA cases tried in that jurisdiction, the litigant is entitled to a jury trial. This is a time when that rule can be crystallized.

Thus we submit that respondent's whole argument is based on a false premise and is not worthy of serious consideration. The right to a trial by jury is part and parcel of the FELA. If there is sufficient evidence to warrant the submission of a case to the jury and the jury makes an award in a litigant's favor, and if that verdict is taken away from him on review by a state appellate court, a litigant is not only entitled to have the Supreme Court of the United States review the decision of the state court under its right and duty provided by Article VI of the Constitution of the United States, but if such action by the state court were permitted to stand he is deprived of his property without due process of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

We submit, therefore, that this Court not only has jurisdiction of this matter on the grounds of the sufficiency of the evidence to show negligence under the FELA, but in addition, it has the duty to review the opinion in the case at bar because of the disparity and conflict in the law as

announced by the Missouri Supreme Court with other federal and state decisions on the same questions under the FELA. They have been fully treated in petitioner's original brief (pp. 36-42).

We consider further argument on the jurisdictional point unnecessary.

CONCLUSION.

Petitioner respectfully submits that this Court has jurisdiction to entertain petitioner's action and that it has the constitutional duty under Article 6 to review the action of the Missouri Supreme Court in substituting its findings for those of the jury.

Petitioner further submits that the record evidence clearly justified a submission to the jury of the questions of the negligent order, the safer method and the sufficiency of the help furnished. The opinion of the Missouri Supreme Court is in conflict with and sets up rules of law in direct opposition to the holdings of the United States Supreme Court and the other state and federal courts construing rights afforded to railroad workers under the Federal Employers' Liability Act.

Wherefore, your petitioner prays this Court to reverse the decision of the Supreme Court of Missouri and reinstate the jury verdict.

Respectfully submitted,

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Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 320.

PROCK STONE, Petitioner,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT.

Petitioner's statement is inaccurate in respect to the evidence concerning defendant's beforehand knowledge of the supposed danger. As this may be the crux of the case, we consider it necessary to point out the errors.

We adopt Petitioner's statement with the following corrections:

1. Pp. 2 and 3—The statement implies that it was known that a spike was driven through the tie into the ground

before the accident. The evidence is that this was discovered after the tie was extracted and rolled over (R. 61, 106). See Stone's own admitted statement (R. 35).

2. P. 2—"Dick Stoughton testified that in order to pull out a tie with a spike through it, it would require the efforts of four men (R. 97)." This is incorrect. The testimony was "three or four" men (R. 96). Three were actually used (R. 12). The R. 97 reference is to an alleged impeaching statement.

3. P. 3—"Despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he ordered plaintiff to pull harder (R. 12, 51, 52, 61)." This is a concoction incorrect in detail and result. We are sure petitioner's honorable lawyers will wish to correct it.

a. The "awful hard" ingredient comes from R. 97. It refers to such times in general, not the one involved in the accident.

b. The "it required four men" ingredient is a reference to an impeaching statement as to how many men were "*finally*" required to draw the stubborn tie (R. 97).

c. "Two men could not pull it." This implies two men only were employed at the time. This is false (R. 12).

d. The "Despite the fact that" form of the sentence implies the imputed knowledge *prior* to the order. Such knowledge came to him *after* the order. See a. and b. above.

4. P. 3—"There was sufficient evidence . . . that only two men were actually working at extricating the tie." Petitioner himself testified directly contrariwise on direct examination (R. 12):

Q. Then what did you do? A. Well, we both get back down and give a hard pull with him [Stoughton] a prying and I hurt my back.

5. P. 4—"The testimony also showed that the straw boss had encountered several ties with spikes in them . . ."

a. "Several" is two or three *including* the one in question (R. 94-96).

b. "Had encountered." The use of the pluperfect tense implies that these encounters *preceded* the accident. There is no such evidence, as Stoughton testified he didn't know on which occasion Stone was hurt (R. 98).

6. P. 4—"The boss, Eugene Slagle, said they knew something was holding the tie because it pulled so hard . . ." This is in answer to a hypothetical line of questioning (R. 106). *Slagle wasn't even in the vicinity at the time* (R. 105).

SUMMARY OF ARGUMENT.

I.

Jurisdiction.

1. This court has no constitutional power to impose upon State judicial systems the requirement that disputed fact issues under F. E. L. A. be submitted to a jury. Seventh Amendment is inapplicable.

Illustrations:

a. A twelve-man verdict (required by Seventh Amendment) is not required in the State courts.

b. Louisiana provides a frankly advisory jury trial and frank appellate review of disputed fact issues. This is in direct contravention of the requirements of the Seventh Amendment, yet has never been regarded as unconstitutional.

c. Neither this court, nor any other, challenges the constitutionality of State appellate court's review of one purely factual issue, viz., the amount of damages, although this is prohibited to Federal appellate courts by the Seventh Amendment.

d. State appellate courts have power to reverse a jury verdict outright, whereas Federal appellate courts must remand for a new trial, where a fiction is not observed, because of the Seventh Amendment.

2. Upon review of a State court's decision of a federal question, absent any issue of due process or equal protection, the Supreme Court is bound by the findings of fact ultimately made by the state's judicial system; and if in that system the jury's findings are subordinate to those of the court of last resort, the binding effect of the ultimate findings is none the less.

II.

Merits.

Petitioner is not entitled to relief here, because the facts requisite to liability under any theory he submitted were neither proved nor found by the jury.

State courts have the right to reverse outright because of the failure of a plaintiff's submitted theory of liability, whereas Federal courts must remand if the evidence supports any theory of liability because of the Seventh Amendment.

ARGUMENT.

I.

Jurisdiction.

Jurisdiction of this Court to afford the relief sought by the petitioner is expressly challenged on constitutional grounds.

The kernel of the petitioner's complaint is expressed in his eighth specification of error, as follows:

> "The Supreme Court of Missouri in its opinion erred (8) in substituting its findings of fact for those of the jury in conflict with other applicable decisions of this Court" (Brief, p. 26).

He supports this specification by a quotation from *Bailey v. Central Vermont Railway,* 319 U. S. 350, l. c. 354 (Brief, p. 31) [quoted later in Blair v. B. & O., 323 U. S. 600, 602], as follows:

> "The right to trial by jury is a 'basic and fundamental feature of our system of Federal jurisprudence.' *Jacob v. New York City,* 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under Federal Employers' Liability Act . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Other authorities in the United States Supreme Court to this effect are cited (Brief, pp. 31-32). Respondent earnestly requests the Court to review the validity of the foregoing quotation from the *Bailey* case *as applied to state court trials,* and to reconsider the action taken in certain others, in the light of the following suggestion:

The right to trial by jury is part and parcel of the remedy afforded by F. E. L. A. only if the plaintiff exercises his option to bring his suit in the federal court.

F. E. L. A. by its terms does not require a jury trial. It says nothing about a jury, except in Section 3 (U. S. C. A. 53), where the word is obviously used in the sense of "trier of the facts." The origin of the unqualified statement in the *Bailey* opinion quoted above must lie in the United States Constitution, Amendment VII, which provides:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This amendment, however, applies only to trials in the United States courts. It does not apply to trial of any nature in the courts of the various states. Indeed, it would seem that the Court had overlooked the word *Federal* in the quotation from the Jacob case, upon which the *Bailey* decision was based. The complete initial sentence of the *Jacob* case, quoted only in part in *Bailey*, is:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence, which is protected by the Seventh Amendment."

The questions we raise are:

1. **Are the Missouri courts part of "our system of federal jurisprudence"? and**

2. **Are jury trials in such courts "protected by the Seventh Amendment"?**

Four illustrations will show these questions must be answered "no", and that the contrary effect of the holdings in *Bailey*, *Blair* and other cases is an inadvertence.

It has been argued that the Seventh Amendment does apply to state court procedure, and this argument arose under F. E. L. A. It had previously been held by this Court and by inferior courts that the jury trial referred to in the Seventh Amendment means a trial before twelve jurors who must render a unanimous verdict and that the Fourteenth Amendment did not extend the requirements of the Seventh Amendment to state trials of state issues. *Maxwell v. Dow*, 176 U. S. 581, 586.

When F. E. L. A. was enacted and when plaintiffs sought the enforcement of rights arising under the act in the state courts, the railroads raised the question of whether, the right being a federal right, the parties were entitled to a Seventh Amendment jury trial. In a number of cases cited in 1915, this Court ruled that the Seventh Amendment does not apply to actions in the state court, and that a state may legally provide a jury trial with a less-than-unanimous verdict to try cases arising under F. E. L. A. The first of these cases is *Minneapolis & St. Louis R. Co. v. Bombolis, Administrator*, 241 U. S. 211. This opinion and those that followed it show the impatience of the Court with the suggestion that the requirement of a jury trial imposed by the Seventh Amendment applies to state courts, and the effect of these holdings is that any state may set up its own judicial system according to its own notions, in which to enforce any legal right, whether granted by the state or the federal government. So long as the state's judicial system complies with due process and equal protection, the entire effect upon it of the United States Constitution is satisfied.

That this is an accurate constitutional concept is evident from the second clause of the Seventh Amendment,

which prohibits federal courts from re-examining facts tried by a jury. In the absence of this amendment there is no constitutional reason why these facts might not be again reviewed on appeal. Since this amendment has no force to control state court procedure, it follows that factual review by state appellate courts is not prohibited by the Federal Constitution.

Whether state constitutions and statutes prohibit such review, and to what extent, are for the determination of the state involved, through its judiciary, and presents no federal question.

"The highest court of the State is the final judge of the powers conferred by the state laws . . . ," Holmes, J., in King v. West Virginia, 216 U. S., l. c. 101.

It happens that there is a state which expressly affords only an *advisory* jury trial in law cases, as in the former practice we have done everywhere in equity cases. *Delgarn v. New Orleans Land Company,* 161 La. 653, 109 So. 345. That state also permits review of factual findings on appeal in law cases (again cf. equity practice), under its constitutional provisions. Constitution, Louisiana, Art. 7, Sec. 10:29; *Brown v. Louisiana Ry. & Nav. Co.,* 147 La. 829, 86 So. 281, 282; Harvard Law School Bul., Dec., 1952, vol. 3, no. 5.

This is not in the teeth of the Seventh Amendment because the Seventh Amendment does not apply to state procedure. This is a second illustration that F. E. L. A. does not and cannot require a Seventh Amendment jury trial within a state court.

Congress could no more oblige Louisiana to provide a non-reviewable jury trial for F. E. L. A. cases than it could have forced Minnesota to provide a twelve-juror verdict for them. The litigant takes the state judicial

system as he finds it, and if he likes it not, as a plaintiff he has the option of filing his lawsuit in the federal court. Frankfurter, J., dissenting in *Brown v. Western R. of Ala.*, 338 U. S. 294, 300.

If, as petitioner charges, the State of Missouri, through its judiciary, has "arrogated to itself the function of the jury" (Brief, p. 36), we say that it has the constitutional right to do so, just the same as Louisiana! Const. U. S. Amdt. 10, a song whose words we remembered, but whose tune we sometimes forgot.

No charge was made below, nor is it made here, that this alleged conduct has deprived petitioner of equal protection of the laws or of due process; so the question of whether in this case the Missouri procedure was unequally applied is not before this court. "We do not discuss petitioner's contentions which he failed to assign as error below." Slozinsky v. U. S., 300 U. S. 506, 514. In other respects Missouri's civil procedure is her own concern and none of the United States'.

Let us take a third example. It is hard to conceive of an issue more typically factual (as opposed to legal) than the determination of the amount of damages to which an injured plaintiff is entitled. As this is a question of fact, it cannot be reviewed by federal appellate courts for force of the Seventh Amendment. *Smythe Sales Co. v. Petroleum H. & P. Co.*, 141 F. 2d 41. *Lincoln v. Power*, 151 U. S. 436.

It is a commonplace, however, that the state courts have and regularly exercise the right to superintend the amounts of verdicts on appeal, even when the action is based on F. E. L. A.

In *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, the jury returned a verdict under F. E. L. A. for $25,000, which was cut to $15,000 by the trial court and to $13,500 by the

Nebraska Supreme Court. This Court, through Mr. Justice Holmes, affirmed the judgment for $13,500, saying (l. c. 334):

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

If state appellate courts have power to review this finding of fact, why, constitutionally speaking, have they not the power to review any finding of fact?

There is at least one other—fourth—illustration that a constitutional federal court jury trial differs from an equally constitutional state court jury trial of an F. E. L. A. case. Under the Seventh Amendment a Federal appellate court has no constitutional power to reverse outright a verdict for the plaintiff. The cause must be remanded for a new trial no matter how clear the case may be for the defendant. *Slocum v. New York Life*, 228 U. S. 364. It is true that by the fiction of reserving the ruling on the motion for directed verdict (Baltimore and Carolina v. Redman, 295 U. S. 654) and of *deeming* the reservation to have occurred whether it did or not (Rule 50b), the Court has managed to get around the effect of *Slocum*, notwithstanding the "impassable barrier" warning of Mr. Justice Holmes' dissent, l. c. 400. [The propriety of this fiction we leave to readers of Mr. Justice Black's dissent in Galloway v. U. S., 319 U. S. 372, 396.] The point is that such a fiction is unnecessary in state courts because the Seventh Amendment does not apply to them. *Stoll v. First Nat'l. Bank*, infra.

The right to a jury trial of a Federal question in the state court is not the right to a Seventh Amendment jury trial at all. It is only the right to such a jury trial, if any, as the state affords other litigants.

In *Brady v. Southern Railway Co.*, 320 U. S. 476, the Court held (l. c. 479):

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states (Citing cases). It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question."

This summary treatment of the constitutional point does not sufficiently define the scope of the Supreme Court's function. Obviously the Supreme Court could not determine the "amount of evidence" necessary to establish the federal right in every case since the amount of evidence which will convince one jury may not be a sufficient amount to convince another jury. Essentially the function of the Supreme Court in these cases is to determine the meaning of the federal statute. Since the statute uses the word "negligence," it is no doubt constitutional for the Supreme Court to define with particularity what the word "negligence" in the statute means under certain facts. The determination of whether these facts exist or not, however, must be a function of the state whose judiciary

is invoked by the plaintiff, through its own procedure, untrammeled by federal interference. Some of the prior opinions, and certainly the petitioner in this case, have lost sight of this fundamental proposition.

We do not contend, if a finding is unsupportable by credible evidence in the record, that the Supreme Court is then bound to accept it; for such a finding would be without due process of law. In this case, however, even the petitioner concedes what respondent does not: that on the evidence the findings could logically go either way (Petition and Brief, pp. 8, 9, 30, 46, etc.). The issue we make is simply whether the United States Constitution permits the Congress (or, really, this Court, since Congress said nothing about it) to designate this or that part of a state's judicial system as the part which must make the findings of fact on a federal question.

A more precise statement of the function of this Court in such instances than in the *Brady* case is the following from *Miedreich v. Lauenstein*, 232 U. S. 236 (l. c. 243):

> "This court has repeatedly held that in cases coming to it from the Supreme Court of a State it accepts as binding the findings upon issues of fact duly made in that court (citing authorities). That principle is applicable here. The case does not come within the exceptional class of cases where what purports to be a finding of fact is not strictly such but is so involved with and dependent upon questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than of a pure question of fact, or where there is that entire lack of evidence to support the conclusion upon the Federal question that gives this court the right of review."

One of the facts upon which the Supreme Court of Missouri decided this case is that the plaintiff did not, at the

time of his injury, exert more force than was ordinarily necessary to draw a tie without a spike in it (R. 133-137). This particular finding is challenged by petitioner (Brief, pp. 44, 45, 46). Petitioner says:

> "This is an unwarranted conclusion of the court based upon an extremely narrow and erroneous construction of evidence and a construction most detrimental to the plaintiff."
>
> "It is for the jury, not the court, to draw all reasonable deductions and inferences from the evidence, whether the evidence be direct or circumstantial.
>
> "Since the jury is the one to resolve conflicts and since there is a conflict in the evidence, an appellate court has no right to substitute its findings for those of the constitutional tribunals appointed by Congress to decide these factual issues."

Such arguments as these, when made in this Court, demonstrate petitioner's failure to understand that the courts of Missouri, which he chose to invoke, were not a "constitutional tribunal appointed by Congress." They are a tribunal set up by the people of Missouri. Whether under the Missouri system of jurisprudence appellate courts do in a given instance usurp the function of a jury in determining factual issues is a question of local procedure to be decided by the state judiciary. In other words, the people of Missouri, like the people of Louisiana, may permit appellate review of facts if they choose to do so. When this Court takes jurisdiction to review the decision of the Missouri Supreme Court it must do so on the facts duly found by the Missouri judicial system, which means, in the last analysis, the Missouri Supreme Court.

In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, the Court held (l. c. 97):

"The jurisdiction of this court to review the proceedings of the state court, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specifically set up in the state court and denied by the rulings and judgment of that court. Section 709, Rev. Stat. U. S. **Nor does this court sit to review the findings of facts made in the state court, but accepts findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court.**" (Citing authorities.)

We feel that the findings of fact of the Missouri court upon which the opinion turns are the only findings of fact which a reasonable man could arrive at in view of the record. But whether this is so or whether the Missouri Supreme Court has only given "lip service" to these principles of law (Brief, p. 32), or whether or not the Missouri Supreme Court has arrogated to itself the function of a jury (Brief, p. 36), or whether or not it has made "a substitution of its findings for those of the jury," we contend that under the Constitution of the United States this Court must take the facts found by the highest judicial court of Missouri (conformably to due process and equal protection) as the basis of its determination of whether a federal right has been denied.

If this be the true jurisdiction of the Supreme Court of the United States, then an examination of the petitioner's petition and brief will disclose that no argument for reversal of the cause has been made. On the facts found by the Missouri Supreme Court, doubtless even the petitioner

will concede that he has no right to recover; for he states the principal question for decision by this Court as follows (Petition, p. 8):

> "Can a State Court of last resort, under the applicable decisions of this Court, in reviewing the evidence submitted to and passed on by a jury, in an action brought under the Federal Employers' Liability Act, substitute its findings, deductions and conclusions from the evidence for that reached by a jury in its verdict **when the evidence justified a verdict either way on the issues?**"

Answer, echo! "Loooo—iiii—sii—anaaaa!"
Echo answers: "Re—ee—ee—mi—ii—ti—tu—ur!"

II.

Merits.

We say, if the inferences (i. e., findings) can be drawn either way on the evidence in the record, that those drawn by the Missouri Supreme Court prevail, under the Missouri system as applied, and therefore under the Federal Constitution, over those drawn by the jury.

However this proposition may fare in this court, we also contend that the judgment of the Supreme Court should be affirmed because conceding to Petitioner all of the reasonable inferences that could be garnered from the evidence, Petitioner did not make out a claim for relief under the act and applicable decisions.

Petitioner's theory of liability in the trial court, in the Missouri Supreme Court, and here, is expressed in his instruction number 1, set out at pages 110 and following of the Transcript.

A number of errors in the manner of submission of the case, including the wording of this instruction, were raised

by the Respondent in the Missouri Courts (T. 119, 120). Because the Missouri Supreme Court held that plaintiff did not make a submissible case under the Act, it did not pass upon the procedural errors raised (Opinion, T. 125), and in case Petitioner prevails here, the cause will be remanded to the Missouri Supreme Court to pass upon these allegations. *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 126. For this reason, the errors in the instruction will not be discussed *qua* errors; yet in order to test the sufficiency of Petitioner's facts, it is necessary to place them beside his theory of liability, and to find his theory of liability we must turn to the instruction he offered. Under the Missouri appellate procedure, if plaintiff did not make out a case on the theory submitted in his instructions, the cause may be reversed and not remanded for trial on some other theory. *Stoll v. First National Bank*, 345 Mo. 582, 134 S. W. 2d 97.

Three hypotheses of liability are set out in the instruction and the evidence fails to establish liability under any of them.

Somewhat confusingly, the three theories were combined in a single long instruction (T. 110 et seq.), but each theory was separately and disjunctively stated, and recovery was authorized under any one (T. 113, top).

The More Than Ordinary Strength Theory.

The first theory submitted is that defendant negligently directed plaintiff "to use more strength than was ordinarily necessary and customary" (T. 111).

Petitioner argues this theory from pages 33 to 42 of his brief, and speaks of the findings of the jury. He never once refers to the only source of those findings—the instruction he submitted. He speaks (Brief, 40) as if the jury's finding was that defendant's order required Stone's

"overtaxing his physical condition and ability." This might have been a valid theory had the facts justified such a finding, but there is no use arguing a moot case. The jury did not make such a finding, and was not asked to so find. The most it could be said to have found was that Petitioner was directed "to use more strength than was ordinarily necessary and customary" (T. 111, fol. 281).

We concede that from the evidence it could reasonably be inferred that Stoughton's order required Stone to use more strength than was ordinarily necessary and customary. We deny that such a finding constitutes negligence under F. E. L. A. We do not concede, and for the reasons well expressed in the opinion, that there could be a reasonable inference from the evidence that he was negligently required to overtax his physical condition. However, that question is moot. It does not present in this court a justiciable controversy. Such a finding was not asked, and it was not made. We are here to discuss the record in this case.

We know of no case—none has been cited in any of the three courts—in which liability was affixed for requiring more strength than was ordinarily customary.

Petitioner cites *Waterhouse* (Br. 36). But the Waterhouse jury found, 223 S. W. 2d l. c. 655:

> "The duties assigned Plaintiff by his foreman during the afternoon of August 13, 1947, subjected Plaintiff to a hazard from heat which was greater than ordinary."

Where is the analogous finding of *hazard* in the Stone case?

Further, could any reasonable person find, in the absence of proof of some previously existing disability, that the exertion of more strength than ordinarily required

would create an unusual hazard? In the Waterhouse case there was direct proof of such a disability: "I told him I was getting crazy about the head, and hot; and something was wrong." L. c. 658. Where is the analogous evidence in the Stone case? And the Waterhouse case found on this evidence: "In directing Plaintiff to continue working after being informed by Plaintiff that he was getting too hot, the foreman was guilty of negligence" (l. c. 656). Where is the analogous finding of knowledge of disability in the Stone case?

Petitioner cites the *Blair* case. This is not an overstrain case. It is a negligent method of work case. We do not know, from the opinion, what the findings of the jury were in the *Blair* case. We do know there was evidence that defendant was warned that the method required was dangerous. "Petitioner's insistence that the three could not unload the heavy pipes was overridden." 323 U. S., l. c. 603. There is no analogous testimony in the Stone case. There is certainly no analogous finding. Note that the requirement in the Blair opinion is that there be "reasonable" safety in the manner of work. The vital word "reasonably" is stated, iterated and reiterated in the same sentence (*Blair*, l. c. 601). No such criterion was included in the jury findings in the Stone case, nor could it have been, under the evidence.

The arguments of the Stone opinion on the submissibility of this issue are conclusive. Any fair definition of negligence arising out of an alleged order to overexert should at least include (1) that the amount of exertion required was more than an ordinary laborer could stand, or more than the particular employee, because of some known disability, could stand, and (2) that the employer should reasonably have known of that danger. *Haviland v. Kansas City P. & G. R. Co.*, 172 Mo. 106, 72 S. W. 515. Petitioner has never claimed that he was under any known disability,

nor is there any evidence or finding to that effect (as there was in Waterhouse); yet neither does he claim that the effort required of him was more than an ordinary laborer could stand. There is no evidence or finding to that effect either.

The Petitioner failed to prove facts authorizing submission of a theory of a negligent order to overstrain, and the jury did not find such facts to have occurred. What they did find does not constitute negligence.

The Insufficient Help Theory.

As in the case of the negligent order theory, Petitioner manages to discuss this question without touching the actual jury findings. If the jury found for Petitioner on this theory, it must be said to have done so under the instruction. The instruction predicated a finding of failure to supply more than two men (T. 112, top). Petitioner's own evidence and theory of the case was that when two men proved insufficient, a third, Stoughton, added his strength, with his "prizen hold" (T. 12). Petitioner now for the first time says there is a conflict in the evidence as to whether this was so at the time of Stone's strain, but cites no portion of the record to the contrary. We have read the record references at page 3 of his statement, but find no support in them even for his own conclusion, "apparently." However, in Missouri (and we think under any other civilized procedure) a plaintiff will not be allowed to recover on a theory at odds with his own sworn testimony. *Berry v. K. C. P. S. Co.*, 343 Mo. 474, 484, 121 S. W. 2d 825, 830.

Petitioner testified (T. 12):

"Q. Then what did you do?

"A. Well, we both get back down and give a hard pull with him a prying and I hurt my back."

There were **three men**. The "strongest evidence," in the record, according to Petitioner himself (Br. 42) is that it would be awful hard for **TWO men** to pull such a tie. Even under Petitioner's own theory, the findings and the evidence were insufficient.

But even had there been evidence and a finding there was need for more than three men, which there was not, could we suppose that Stone would have then pulled less hard than he did? This is not a case where the whole weight of an object was thrown upon plaintiff. He could pull as hard as he thought he should. You can lead a horse to water but you can't make him drink. Is it the law that a foreman cannot try to do the work with three, before he brings in a fourth laborer? And who is to say that four will be enough, without trying? Maybe he should use five or six, or seven. Obviously he may try to do the work with any number he chooses, *so long as it appears reasonably safe to do so.* Stone knew far more about the strength he could safely exert than Stoughton, yet he made no suggestion prior to the accident that more were needed, as in the Blair case. Again, the argument of the opinion on this theory is unimpeachable.

Further, the submission, and therefore the finding, was that using two men was not *safe*. This means absolutely safe, not reasonably safe. This has never before been deemed a criterion of liability. The true criterion should be that use of three men was not reasonably safe, and that this was or should have been apparent to defendant. These facts were neither proved, submitted nor found. Petitioner failed on this theory, also.

The Safest Method Theory.

Petitioner in discussing this theory again makes no reference to his submission, but he makes it easier for us in this instance by frankly arguing here that the point in-

volved in this part of the case is that a Federal employer is obliged by the F. E. L. A. expression "negligence" to utilize the *safest* method possible (Br. 50).

He abandons altogether the "reasonably safe" rule, as he must; for his submission and the finding under it is that if there was a *safer* method, defendant must employ it (T. 112).

Obviously, if defendant must employ any safer method, he must employ the safest. Nothing is said about reasonableness. Therefore a reductio ad absurdum is a fair method of argument. The safest method to avoid running a train over a defective tie is to abandon the railroad altogether. The proposition is absurd.

The findings of the jury do not appear in the Meech opinion, which is the only authority Petitioner cites to support this heady proposition. However, a summary of the petition appears at 156 F. 2d 110. The argument quoted at Br. 50 was made in discussing evidence concerning the second count of the petition, which, the court says, was based upon "the defendant's failure to provide him with *a reasonably safe place* to work."

Evidence of a safer method is admissible, to be sure, to support a finding that some other method is not reasonably safe, but there is *no* authority, we are confident, which would dispense with the finding that the method used was not reasonably safe. There was no such finding; and had there been, there was no evidence to support such a finding.

SUMMARY.

Examining the three theories seriatim, we see that the necessary findings are not supported by the evidence, and were not made by the jury. The Missouri Supreme Court properly reversed the trial court judgment outright. In

this connection it will be well to recall that under the Seventh Amendment, Federal courts must judge the sufficiency of the evidence against any theory available under the pleadings, as the motion for directed verdict must be ruled as of the time the ruling is reserved. *Slocum v. N. Y. Life*, supra, et cet. Under Missouri practice, the sufficiency may—and constitutionally—be finally judged on appeal anew against the theory presented by the plaintiff below in his offered instructions. *Stoll v. First National Bank*, supra. This is a condition which Petitioner accepted when he invoked Missouri jurisdiction. This court cannot constitutionally force Missouri to amend its appellate practice to give Petitioner another bite at the apple. He has had his day in court and, hence, due process of law. The writ should be dismissed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PROCK STONE,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Respondent.

No. 320.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

MOTION FOR REHEARING AND SUGGESTIONS.

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MOTION.

Respondent respectfully moves the court to order a rehearing of the above cause.

GROUNDS.

Who has the ultimate jurisdiction—the Missouri Supreme Court or this court—to decide whether the evidence presents a fairly debatable question of negligence or causation?

This issue, to which this case now simmers down, is not discussed in the court's opinion. As this question involves hundreds of lawsuits and millions of dollars, and is itself "fairly debatable," Respondent earnestly requests the court to grant a rehearing that it may be adequately considered and authoritatively decided for the future guidance of litigants in F. E. L. A. cases.

CERTIFICATE.

I certify that this motion is presented in good faith and not for delay.

LON HOCKER.

SUGGESTIONS.

I.

In order to approach the jurisdictional problem it is necessary to examine the nature of the question: "Does the evidence present a fairly debatable issue of negligence and causation?" If this be a federal question, then this court has jurisdiction to answer it; otherwise not.

Jurisdiction to supervise *state* court judgments must depend, in the last analysis, upon sanctions of the United States Constitution.

As the court's opinion grants that reasonable minds might differ, it is apparent that the question might be decided either way without denying due process of law. Federal jurisdiction cannot, therefore, hang upon the Fourteenth Amendment.

For reasons discussed in Respondent's brief, pp. 8, 9, 10, 11, illustrating the differences between permissible State and Federal jury trials, Federal jurisdiction cannot hang on the Seventh Amendment. This is apparently conceded in the court's opinion by the one time substitution of the phrase "the trier of the facts" for "the jury" (p. 3).

That leaves as a basis for federality, so to speak, only the supremacy clause of Article VI. The clause reads:

> "This constitution and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby; . . ."

The "law" we are talking about (45 U. S. C. 51) affixes liability for "injury or death resulting in whole or in part from the negligence . . . of such carrier."

We concede that the meaning of the words "resulting" and "negligence" in this law are federal questions. But is it the meaning of these words that the court here decides?

Obviously not, for the opinion holds that the question of negligence *vel non* and causation *vel non* is for the *trier of the facts.* These *vel non* issues are, therefore, issues of fact by force of the court's own decision. They involve the credibility of the evidence, the weight of the evidence and the assaying of whatever mysterious imponderables go into the resolution of a fact issue. This court does not undertake to say that whenever such and such evidence appears, or even that whenever such and such evidence is found to be true, negligence or causation exits. The court only says that in such a case negligence may or may not be shown *according to the decision of the trier of the facts.* The opinion adds nothing to the definition of the statutory words "negligence" or "resulting." Under the opinion different "triers" might quite legitimately reach contrary results on identical evidence as to the *vel non* issues.

It follows that, however the *fact* issues be resolved, the *law* remains supreme. Jurisdiction to resolve the submissible evidence issue therefore cannot hang upon the supremacy clause. As there is nothing else to hang it on, no other conclusion can be reached but that jurisdiction to answer this question does not and cannot lie in this court.

II.

A determination of lack of Federal jurisdiction would seem to end the matter, yet a moment may be well spent in considering the jurisdiction for this purpose of the Mis-

souri Supreme Court. Plaintiff invoked the state courts. He did not have to do so. He took them as he found them. The question of to what extent a state jury's findings of fact are binding upon a state appellate court is surely a question of local, state law. If it were not so the Louisiana advisory jury practice and the states' appellate remittitur practice would violate the Federal Constitution. At the most the Missouri Supreme Court has rejected the jury's findings as incredible. This is permissible under state practice. It satisfies the State Constitution, as to which the Missouri court is the final interpreter, and in the enforcement of which this court is not involved.

III.

We cannot express our concern in more powerful words than those of this court in Driver's Union v. Meadowmoor Co., 312 U. S. 287, 294:

> "We can reject such a [state court] determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. *To substitute our judgment for that of the state court is to transcend the limits of our authority.*"

Respectfully submitted,

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